2016

Lisa Penunuri and Barry Siegwart, Plaintiffs/ Appellants, vs. Sundance Partners, Ltd; Sundance Holdings, LLC; Sundance Development Corp; Robertredford;redford 1970 Trust; Rock Mountain Outfitters, l.c.; And Does I-X . Defendants/ Appellees.

Utah Supreme Court

38567

IN THE SUPREME COURT OF UTAH

LISA PENUNURI and BARRY SIEGWART, Plaintiffs/Appellants, vs. SUNDANCE PARTNERS, LTD; SUNDANCE HOLDINGS, LLC; SUNDANCE DEVELOPMENT CORP; ROBERT REDFORD; REDFORD 1970 TRUST; ROCK MOUNTAIN OUTFITTERS, L.C.; and Does I-X. Defendants/Appellees.	APPELLANTS' BRIEF Case No. 20160683-SC Trial Case No: 08040019 Court of Appeals Opinion: 2016 UT App 154.

BRIEF OF THE APPELLANT

ON CERTIORARI FROM UTAH COURT OF APPEALS
The Honorable Frederick Voros, Presiding

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Oral Argument and Published Decision Requested

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PARTIES

1) Lisa Penunuri, the Plaintiff and Appellant;

2) Barry Siegwart, the Plaintiff and Appellant;

3) Sundance Partners, LTD, Defendant and Appellee;

4) Sundance Holdings, LLC, Defendant and Appellee;

5) Sundance Development Corp., Defendant and Appellee;

6) Robert Redford, Defendant and Appellee;

7) Redford 1970 Trust; Defendant and Appellee;

8) Rocky Mountain Outfitters, L.C.;

9) Does I-X.

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JURISDICTION

The Supreme Court of Utah has jurisdiction over this matter pursuant to Utah Code Ann. §78A-3-102 (2016 and Utah R. App. P. Rule 51. This Court granted certiorari on the Court of Appeals' holding in *Penunuri v. Sundance Partners Ltd.*, 2016 UT App. 154, 380 P.3d 3, on November 1, 2016 docket no. 20160683.

STATEMENT OF THE ISSUES & STANDARD OF REVIEW

Issue #1

Whether the court of appeals erred in concluding that the standard stated in *Berry v. Greater Park City, Co.* 2007 UT 87, ¶27, 171 P.3d 442, and *White v. Deeslehorst*, 879 P.2d 1371, 1374 (Utah 1994), for summary judgment should be read as permitting judgment solely on the grounds that reasonable minds could not find in favor of the plaintiff in a negligence case in which the standard of care is not fixed by law.

Standard of Review

Because a grant of summary judgment by definition involves conclusions of law, the Supreme Court of Utah affords no difference to an appellate court's decision and reviews it for correctness. *See Berry v. Greater Park City Co.,* 2007 UT 87 at ¶8, 171 P.3d 442. In addition, appellate courts "views all facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." *See Penunuri v. Sundance Partners Ltd.,* 2016 UT App. 154, ¶15.

Statement and citation to the record that this issue was presented in the petition for certiorari or fairly included therein.

This issue was presented in the petition for certiorari and/or fairly included therein at pages 1, 12-16. This issue was preserved in the trial court at R. at 586-587 and Oral Argument at 1575 pp.26-27.

Issue #2

Whether the court of appeals erred in affirming the district court's determination that reasonable minds must conclude that there was no gross negligence under the circumstances.

Standard of Review

Because a grant of summary judgment by definition involves conclusions of law, [Appellate Courts] afford no difference to the district court's decision and review it for correctness." *See Berry,* 2007 UT 87, at ¶8, In addition, appellate courts "views all facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." *See Penunuri,* 2016 UT App. 154, at ¶15.

Statement and citation to the record that this issue was presented in the petition for certiorari or fairly included therein.

This issue was presented in the petition for certiorari and fairly included therein at pages 2-3, 4-11, 12-16, and 16-18. This issue was preserved in the trial court at R. at 590-607, 581-586 and Oral Argument at 1575 pp. 50-53. Bench Ruling at 1576 p 5-9.

Issue #3

Whether the court of appeals erred in affirming the district court's award of deposition costs to Appellees/Defendant.

Standard of Review

A trial court's "decision to award the prevailing party its costs will be reviewed under an abuse of discretion standard." *Jensen v. Sawyers,* 2005 UT 81, ¶140,130 P.3d 325. But "[c]osts were not recoverable at common law; and are therefore generally allowable only in the amounts and in the manner provided by statute," *Frampton v. Wilson*, 605 P.2d 771, 773, (Utah 1980) therefore, questions of law are reviewed for correctness and the Supreme Court affords no difference to the lower court's decision. *Berry*, 2007 UT 87, ¶8.

Statement and citation to the record that this issue was presented in the petition for certiorari or fairly included therein.

This issue was presented in the petition for certiorari and fairly included therein at pages 1 and 18-19. This issue was preserved for appeal at R. 1425-1437, 1438-1447, and 1448-1455, oral argument at 1577 and R. at 1468-1477.

STATUTORY PROVISIONS

1. Utah Rules of Civil Procedure, Rule 56. (Addendum A)
2. Utah Rules of Civil Procedure, Rule 54. (Addendum A)

ADDENDUMS

ADDENDUM A. Utah Rules of Civil Procedure, Rules 56 and Rule 54.

ADDENDUM B. Court of Appeal's opinion, *Penunuri v. Sundance Partners*, Ltd., 2016 UT App. 154, 380 P.3d 3.

ADDENDUM C. Trial Court Orders.

STATEMENT OF THE CASE

NATURE OF THE CASE: On August 1, 2007 Lisa Penunuri went on a guided horse ride at Sundance Stables, where she was thrown from her horse, which fractured her neck. Lisa Penunuri alleges that Sundance et al. was grossly negligent when it's guide Ashley, allowed large gaps to form between the horses while she lead the guided horse ride and that because of the large gaps, Ms. Penunuri's horse dangerously accelerated causing her to fall which caused a C5-C7 subluxation fracture of her neck (R. at 1-14).

The undisputed facts are: Rocky Mountain Outfitters' ("RMO") guide's own training manual warns its guides that when large gaps form between horses, they will cause horses to dangerously accelerate (R. 898); That RMO's guides are solely responsible for preventing gaps from forming (R. 898); To the novice rider these dangerous accelerations come unexpectedly and cause a significant risk of falling off the horse (R. 898); RMO's expert, Rex Walker, testified that a horse will likely dangerously accelerate if gaps extend to three horse lengths (R. 590); A horse length is 7 to 8 feet long (R. 1009); RMO's owner, Joseph Loveridge, testified that a horse will likely accelerate when two to three horse length gaps form between the horses (R. 590); RMO's guide, Braydon Whitely who had worked with RMO's horses and who was very familiar with RMO's horses, testified that RMO's horse are likely to accelerate when the gap is three to four horse lengths apart (R. 590), but that RMO's horses will certainly and unexpectedly

[to a novice] accelerate if the gap reaches 10 horse lengths (i.e. 80 feet) (R. 644); at the time that Ms. Penunuri's horse accelerated and threw her to the ground, the guide had permitted a gap of 125 feet, or fifteen and a half horse lengths (R. 597). By every experienced equestrian's calculation, it was imminent that Ms. Penunuri's horse was going to suddenly accelerate to catch up with the other horses (R. 590).

RMO's guide's training manual warns that hikers, steep hills, etc. pose additional dangers and that the guide must warn the riders that they are coming upon dangers (R. 898). According to RMO's owner, Mr. Loveridge, hikers pose a greater risk when the guide has permitted gaps to form in the train of horses (R. 590). Ms. Penunuri's guide not only allowed a gap of 125 feet, or over fifteen horse lengths to grow, but she then passed some hikers who were hiding in the woods on the inside of a curve after a steep climb (R. 594). Ms. Penunuri's expert, Scott Earl, testified that the sharp bend, the steep incline, and the hikers all posed an additional risk to the riders, and at that point in time the guide was required to have all the horses between one to two horse lengths apart (R. 946, 949-950). At the time that the gaps had formed, the only person who could have closed the gaps was the guide, but the guide instead decided to continue up the trail another 100 feet with full knowledge of the dangers that the gap combined with the three other dangers posed to Ms. Penunuri and in utter disregard for the safety of the trailing guests (R. at 594, 898).

COURSE OF PROCEEDINGS: On January 3, 2008 Lisa Penunuri and her husband Barry Siegwart commenced a personal injury action in the Fourth District Court, State of Utah. On January 19, 2010 the trial court dismissed Ms. Penunuri's ordinary

negligence claims based upon a pre-injury release Ms. Penunuri signed. Ms. Penunuri appealed to the validity of the pre-injury release based upon the Equine Act. The trial court at that time did not release the gross negligence claims. The Utah Court of Appeals and the Supreme Court of Utah on Certiorari found the pre-injury release valid and Ms. Penunuri's ordinary negligence claims were dismissed leaving only her claim for gross negligence. On September 20, 2013 RMO filed a Motion for Summary Judgment to Dismiss Ms. Penunuri's gross negligence claims. On September 9, 2014 the trial court granted RMO's Motion for Summary Judgment on gross negligence. The trial court thereafter granted RMO's award of deposition costs. On September 9, 2014 Ms. Penunuri filed her notice of appeal. On November 21, 2014 the Supreme Court of Utah elected not to retain jurisdiction and poured the case over to the Utah Court of Appeals. On July 21, 2016 the Utah Court of Appeals issued their opinion, affirming the trial court's decision on gross negligence and on costs. On November 1, 2016 this Supreme Court of Utah granted certiorari on the gross negligence claim and the award of costs.

STATEMENT OF RELEVANT FACTS

1. Rocky Mountain Outfitter's ("RMO") guide's instruction manual provides:

> [t]ake your responsibility seriously. *Guests trust you with their safety and often with the safety of their children.* They look to you for experience, instruction, leadership, and knowledge. They also look to you for fun and entertainment. They look to you to make their experience exactly what they want it to be –fun, memorable, exciting, and *safe.* (Record on Appeal at pages 1252, 1575 p. 39).
>
> And:
>
> Once on the trail, it is the ***guide's responsibility to continually watch over and monitor the safety*** and comfort of his/her guests.

1. *Keep your ride in control.* ***Keep guests in site*** [sic] at all times possible. While there are times that they will be unseen constant interaction with guests will help keep a controlled environment.

2. ***Adjust your pace so that large gaps do not form between horses in your string. Gaps encourage horses to trot un-expectedly.***

3. *Advise your guests of upcoming obstacles* that may be difficult or intimidating. Teach them what to do and assure them they will be o.k. (*Up-hills,* down hills, tree branch, logs, *hikers,* etc.)

4. *Continually remind guests of safety issues, re-teaching as you go.*

5. Re-assess the tightness of saddles and remind guests to inform you if they feel their saddle slipping from one side to the other.

6. ***Constantly have safety on your mind***! (*Emphasis added*) (R. 898, 1252, 1575 at p. 40,42).

2. According to Penunuri's expert, Scott Earl, the standard of care is "common sense" among horse people [riders]. (R. 1066, 1070).

3. Penunuri's expert testified that the gaps caused Penunuri's horse to accelerate, which in turn caused her to fall. (R. 941-942, 946).

4. There was a gap of approximately 16 horse lengths (125 feet) between Penunuri and the horse she was following. (R. 1261).

5. The length of a horse is seven to eight feet long. (R. 1009, 614, 958, 599).

6. RMO's employee manual instructed their guides to prevent large gaps between horses, and to warn riders about dangers on the trail. (R. 898, 1252, 1575 at p. 40, 42).

7. Joseph Loveridge, the owner of RMO, testified that gaps should be no more than two to three horse lengths (16-24 feet). (R. 590, 1253).

8. Rex Walker, RMO's hired expert, testified that the gaps should be kept at two to three horse lengths (16-24 feet). (R. 590, 1253).

9. Braydon Whiteley, another guide for RMO, testified that gaps should not extend beyond one to two horse lengths (8-10 feet). (R. 590, 1253).

10. Penunuri's expert Scott Earl testified that the horses should be less than four horse lengths (32 feet) but when the horses came upon the steep hill, sharp turn, and hikers, the horses had to be one to two horse lengths (8-16 feet) apart. (R.1256, 941-942, p.89-90).

11. Braydon Whiteley, who as a guide at RMO was particularly familiar with RMO's horses, testified that "three horse lengths is probably a bit too far, three to four horse lengths." He testified that a gap of three to four horse lengths (24-32 feet) may likely cause RMO's horses to accelerate unexpectedly, but a gap of ten horse lengths (80 feet) ***will*** cause a horse to accelerate unexpectedly. (R. 644, 632, 1262).

12. Joseph Loveridge testified that gaps can cause a horse to trot unexpectedly, and that when a hiker is on the trail, it is even more important to keep the gaps closed. (R. 590, 1254).

13. Where Penunuri fell, she was 102 feet behind Ms. Fort on the trail. Ashley Write testified that Penunuri's horse began to accelerate 23 feet before she landed on the ground, totaling 125 feet (16 horse lengths). (R. 597, 1261).

14. RMO agreed that the gap between the horses was 125 feet at the moment Ms. Penunuri's horse came upon the steep section, bend, and hikers. (R. 1261).

15. The only time RMO contended that Ashley Wright was slowing down the whole ride was in its reply memorandum fact section and they contend that the reason she did not stop was because Ms. Penunuri and an eight-year-old child had stopped. The statement was not presented as an undisputed fact, but was made in response to one of Ms. Penunuri's undisputed facts. (R. 1259-1260).

16. None of the other riders corroborated the statement, but testified just the opposite. The other riders were concerned that the child and Lisa had gotten too far behind and were asking for the guide to slow down so they could catch up. Rather than slow down, in response to the requests to slow down and close the gaps, the guide stated that she would instead go up the trail another 100 feet to pony Haley's horse. (R. 600-601, the fact was presented in Ms. Penunuri's opposition as an undisputed fact, RMO did not dispute it in its reply memorandum,1261-1264).

17. Suzanne Moag, a rider at the front of the group, testified that she was asking the guide to stop and wait until everyone caught up. (R. 848).

18. Ashley, the guide herself, testified in opposition to RMO's contention, stating that the child and Penunuri were not stopped but were slowly continuing up the trail while the guide chose to continue to ride ahead another 100 feet. (R. 614).

19. The guide had an opportunity to close the gaps when she came upon the hikers after having just climbed a short steep section of trail and rounded a sharp bend. (R. 594).

20. The guide could have stopped and waited for the riders to catch up before she passed the hikers. (R. 594, 966-967, 907-912).

21. Penunuri's expert testified that the breach in the standard of care was the guide's failure to stop the moment she came upon the hikers to close the large gaps that had formed. (R. 594, 941-942, pp 89-90; 943, p. 85 lines 22-23; 949, p. 58-59).

22. Mr. Earl Testified:

A. There's several factors that could have – or in my opinion, several things that could have startled that horse and caused it to start running, going around a blind curve, not seeing the other horses at the time, being a distance, wanting to catch up. I'm not even saying it was startled.

Q. Just may have wanted to catch up?

A. Yes, and they will accelerate to catch up. (R. at 396, 594, 949, 1248 and 1259-1260)(Also argued in open court at 1575, p. 48-49).

Q. In fact, Lisa testified that that occurred more than one time on the trail ride, that the horse did catch up, that it, giddy upped a little bit.

A. But people on a curve, and I'm not saying the people did anything wrong whatsoever, they might have not moved, but there's a possibility that the horse didn't realize that they were there until he was right there, and then it startles him.

Q. But you don't really have an opinion as to why the horse—

A. There is a few things that I have read in the testimonies, that I would have an opinion that could have caused the horse to accelerate.

Q. Okay, And would some of those causes – would all of those causes because of the negligence of the guide?

A. ***If the space would have been not there, the distance, that – all of those causes could have been minimalized, or the factor of the horse accelerating.*** (R. 948-949, p. 61-62).

* * *

Q. Is it safer to keep the horses moving than to have the horses stop by the people?

A. If your horses are together, it is safer to continue on and to acknowledge, to make sure everybody is aware that there are people there.

Q. But you would agree that the unpredictability of an animal's reaction to a person on a trail is an inherent risk associated with horseback riding?

A. ***Yes, but you can eliminate or minimize the risk of that***. (R. 955, p. 36 Lines)

* * *

Q. And as she bends around the corner, is it a breach in the standard of care not to have waited, at that point, to have gotten all of those horses back together?

A. Yes.

Q. ***So at that point,*** even if they were three or four horse lengths apart, the fact of the matter is, ***she had to get them back to one or two right***?

A. ***Yes, in my opinion, she should have***.

Q. . . . It's a breach in her duty not to have gotten those back to one and two before she came around the danger, before she saw –

A. ***After seeing the people and knowing there was danger, yes.***

Q. And so she breached her duty, at that point?

A. Yes.

Q. ***And at that point, she's negligent; is that correct***?

A. That would be correct. (R. 941-942, p.89-90).

23. Mr. Earl also testified:

Q. . . . Third, Ashley further breached her duty to keep the riders safe when ***she failed to stop the moment she came around the bend in the trail where hikers were waiting in the bushes to let the horses pass.*** There should be no gaps in the horses at any time, but when the horses are coming upon a situation that could startle them, extra care should be taken to get the horses together before the straggling horses come upon the situation.

Now, your statement there, that there should be no gaps in the horses at any time. That's an impossibility; right?

A. No gaps as in, you know, you're going to have gaps. What is meant there, I guess it isn't written correctly, large gaps.

Q. And again, how would you define a large gap?

A. ***I would say at this point, you should be one to two horse lengths apart.***

Q. There other points where it's okay to be further apart?

A. You should be one to two horse lengths apart at all times, ***but when you're coming up to a danger, to minimize any risks, make sure you're there.***

* * *

Q. ***And so you're saying is there should have been extra care to be taken to get the horses together before the straggling horses comes upon the situation?***

A. ***That is exactly what I'm saying.*** (R. 949-950, pp 57-59).

23. As to causation, Mr. Earl testified:

Q. . . . And then as I reread [your report], I realized what you are saying is just slow the train down and let everybody catch up and then [the hikers can] let the horses go by?

A. See, they can go by people, bridges, water crossings, you're better off to be together at a so-called danger. (R. 947, p 68 lines 10-16).

* * *

Q. Just for clarification, what do you believe caused Lisa [Penunuri] to fall off the horse?

A. ***I believe the large gaps, which allowed the horse to accelerate unexpectedly, that she lost her seating and fell.*** (R. 946. P 72 lines 14-18).

24. The guide Ashley Wright specifically testified:

A. Obviously [Haley's] horse was moving because it got into the open space as I was turning around to grab it. So her horse moved, yes. (R. 614).

25. And, in regards to Ms. Penunuri's horse, Ashley Wright the guide testified:

A. And from me going the 100 feet of where I said that, Lisa [Ms. Penunuri] was not just sitting there. So I didn't go 100 feet away from Lisa as she was stopped, no. (R. 614).

SUMMARY OF THE ARGUMENT

Ms. Penunuri's position is that the *Berry v. Greater Park City, Co.*[1] and *White v. Deeslehorst,*[2] two-part test holding that summary judgment is "inappropriate unless the applicable standard of care is fixed by law, *and* reasonable minds could reach but one conclusion as to the defendant's negligence under the circumstances," is still or should be the rule governing gross negligence claims.[3] Ms. Penunuri contends that *Blaisdell v. Dentrix Dental Sys., Inc.*,[4] was much narrower than applied by the court of appeals in *Penunuri v. Sundance Partners, Ltd.* and was not intended to apply to gross negligence cases where reasonable minds ***could find*** that a defendant breached the standard of care in ordinary negligence (In *Blaisdell*, the plaintiff could not have established ordinary negligence and the plaintiff did not plead gross negligence)[5]. When a plaintiff demonstrates that a defendant is negligent, then it should be a jury determination as to how far from the standard of care the defendant deviated and if it reached the level of gross negligence.

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[1] *See* 2007 UT 87, ¶27, 171 P.3d 442,
[2] *See* 879 P.2d 1371, 1374 (Utah 1994),
[3] *See Berry,* 2007 UT 87 at ¶27
[4] *See* 2012 UT 37, 284 P.3d 616
[5] *See* 2012 UT 37, at ¶13 and 17).

Ms. Penunuri further contends, that even if the court of appeals correctly determined that this Supreme Court meant disjunctive instead of conjunctive and that the summary judgment rule on gross negligence is actually, "inappropriate unless the applicable standard of care is fixed by law, [~~and~~ *or*] reasonable minds could reach but one conclusion as the defendant's negligence under the circumstances,"[6] the particular facts to this case do not justify the grant of summary judgment. It was undisputed that gaps in a train of horses of 32 feet or greater will cause a trailing horse to suddenly and dangerously accelerate to catch up to the herd and that once gaps form only the guide can eliminate them. If a guided train of horses comes upon dangers such as hikers, sharp bends in the trail, and steep sections of the trail then the gaps need to be less than 16 feet in length, or the horse will unexpectedly accelerate.

It is undisputed that the guide permitted a gap of 125 feet grow in her train of horses and that she simultaneously came upon a sharp bend, a steep section of trail, and hikers hiding in the shrubs inside the curve, all three are known dangers to riders, and the guide nonetheless proceeded with utter disregard to the danger that the combination would cause the straggling riders. It is undisputed that at the moment Ms. Penunuri's horse rounded the bend her horse suddenly accelerated and threw her off fracturing her neck. Ms. Penunuri's expert testified that it was the gaps that caused the sudden acceleration, and without the gaps Ms. Penunuri's horse likely would not have accelerated. Ms. Penunuri further contends that "slight care" as a defense, requires that the slight care be related to the actual act of negligence. The actual act of negligence was

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[6] *See Penunuri,* 2016 UT App. 154 at ¶20

passing the three dangers with a gap of 125 feet in her train of horses, the slight care would naturally have to relate to what she does at the moment she came upon the dangers, not what she did before or what she planned on doing later.

Lastly, the court of appeals erred when it affirmed the trial court's grant of costs to RMO. The case was dismissed at the summary judgment stage and not at trial, therefore to award costs the district court had to find that the case was so complex in nature that discovery could not be accomplished through less expensive methods of interrogatories, requests for admissions, and requests for the production of documents. The trial court admittedly did not find it was so complex or that the discovery could not be accomplished through less expensive methods, therefore the trial court inappropriately granted RMO's costs.

ARGUMENT

To prove a claim of negligence Penunuri must establish four elements: (1) that the defendant owed the plaintiff a duty; (2) that the defendant breached the duty; (3) the breach was the proximate cause of the plaintiff's injuries; and (4) plaintiff suffered injuries.[7] "In establishing the existence of a duty, the same analysis is used for both a negligence and a gross negligence claim. The difference between the two lies in the degree of [deviation from the standard of] care to which the defendant is held."[8]

[7] *Torrie v. Weber County,* 2013 UT 48, ¶ 9, 309 P.3d 216.
[8] *Madsen v. Borthick,* 850 P.2d 442, 444 (Utah 1993)

I. ***Summary Judgment Is Inappropriate When The Standard of Care Is Not Fixed By Law***

The court of appeals erred in concluding that the standard of care in *Berry v. Greater Park City, Co.* and *White v. Deeslehorst*, for summary judgment should be read as permitting judgment solely on the grounds that reasonable minds could not find in favor of the plaintiff in a negligence case in which the standard of care is not fixed by law. In *Berry* and *White* this Supreme Court held that in gross negligence, "summary judgment is 'inappropriate unless the applicable standard of care is fixed by law, ***and*** reasonable minds could reach but one conclusion as to the defendant's negligence under the circumstances.'"[9] As a general rule, summary judgment is inappropriate in cases of alleged negligence,[10] and "[o]rdinarily, whether a defendant has breached the required standard of care is a question of fact for the jury."[11]

The Supreme Court of Utah has held, "where the standard of care is not 'fixed by law,' the determination of the appropriate standard of care is a factual issue to be resolved by the trier of fact."[12] In *Berry* the Supreme Court explained, "Utah courts will not grant summary judgment in a gross negligence case where the applicable standard of care has not been fixed by law because '[i]dentification of the proper standard of care is a necessary precondition to assessing the degree to which conduct deviates, if at all, from

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[9] *See* 2007 UT 87, ¶ 27, 171 P.3d. 442 (quoting *White & Miles v. Mountain States Tel. & Tel. Co.*, 709 P.2d 330, 335 (Utah 1985).
[10] *See Ingram v. Salt Lake City*, 733 P.2d 126, 126 (Utah 1987).
[11] *See Jackson v. Dabney*, 645 P.2d 613, 615 (Utah 1982).
[12] *See Berry v. Greater Park City Co.*, 2007 UT 87 at ¶30, 171 P.3d 442.

the standard of care – the core test in any claim of gross negligence.'"[13] For a "standard of care . . . to be 'fixed by law' a statute or judicial precedent must articulate specific standards" for gaps permitted in between horses during a guided horse ride.[14] There are no statutes and there are no judicial precedents, therefore the standard of care for gaps within a guided trail ride is not "fixed by law."

The court of appeals in this case altered the rule created in *Wycalis* and articulated in *Berry* and *White*, by changing an "and" to an "or" specifically stating the Supreme Court in *Blaisdell* interpreted the "*Berry* test in the disjunctive rather than conjunctive elements."[15] In effect the court of appeals in Penunuri altered the rule to "summary judgment is inappropriate unless the applicable standard of care is fixed by law ~~and~~ **or** reasonable minds could reach but one conclusion as to the defendant's negligence under the circumstances."[16] *Blaisdell* did not change the rule, it just reiterated a different rule regarding gross negligence, that if a Plaintiff does not have facts to establish ordinary negligence then the plaintiff would not have the facts to establish gross negligence.[17] Comparing *Berry* to *Blaisdell* reveals this simple rule.

In *Berry* this Supreme Court determined that a showing of possible ordinary negligence was sufficient to preclude summary judgment on gross negligence.[18] In *Berry*

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[13] *See Id* quoting *Berry*, 2007 UT 87 at ¶30, 171 P.3d 442, 449.
[14] *See Id;* and *Pearce v. Utah Athletic Foundation*, 2008 UT 13,¶ 26, 179 P.3d 760, 768. *Wycalis v. Guardian Title of Utah* 780 P.2d 821, 825 (Utah Ct. App. 1989).
[15] *See Penunuri*, 2016 UT App. 154 at ¶20.
[16] *See Id.*
[17] *See Blaisdell,* 2012 UT 37, ¶ 13, 15 and 17.
[18] *See Berry,* 2007 UT 87 at ¶¶28-29.

a ski racer was injured while on a skiercross course (racecourse).[19] The facts that precluded summary judgment on gross negligence were, "testimony of an experienced ski racer, coach, and jumper who witnessed Mr. Berry's accident and faulted the jump's design [and a] second expert in ski racecourse design and safety was likewise critical of the configuration of the accident site."[20] The *Berry* Court determined that this was sufficient for ordinary negligence and since the parties had not directed the court to a standard of care applicable to the design of a skiercross course there also was sufficient evidence to go forward with a gross negligence claim.[21] The *Berry* Court determined that the facts that could have shown the defendant had exhibited slight care were irrelevant when there was no "identified applicable standard of care to ground the [gross negligence] analysis . . ."[22]

In *Blaisdell*, there simply were no facts to establish a claim for ordinary negligence.[23] In *Blaisdell* the plaintiff dentist alleged that the defendant was responsible and negligent for the lost data on his patients when the plaintiff's employee installed the defendant's software on his computers.[24] But the facts did not support that the defendant was negligent, they showed that the plaintiff's employee was negligent.[25] The plaintiff was "well aware of the potential for data loss with the installation of the [defendant's]

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[19] *See Id.* at ¶2.
[20] *See Id* at ¶28.
[21] *See Id* at ¶¶28-30.
[22] *See Id* at ¶¶ 29-30 In
[23] *See Blaisdell,* 2012 UT 37 at ¶¶ 4, 13-16. In *Blaisdell*, the plaintiff did not make a claim for gross negligence.
[24] *See Id* at ¶¶ 3-5.
[25] *See Id* at ¶¶ 3, 13-15.

software [and] that the licensing agreement allocated the risk of data loss to the party with the best ability to prevent such a loss."[26] The plaintiff was responsible to have a backup copy of the data so that if defendant's software caused the data to be lost the plaintiff could reinstall the data.[27] The defendant went as far to receive confirmation from the plaintiff's employee that the data had been backed up.[28] The defendant relied upon the plaintiff's employees' assertion that the data had been backed up.[29] Then the defendant over the phone instructed the employee, who had assured the defendant that the data was backed up, how to install the program.[30] The program as a possible complication of the installation lost all of the dentist's data.[31] The plaintiff's employee had not backed up the data like he had told the defendant.[32]

Ms. Penunuri's facts are considerably more substantial than the facts in *Berry*, which permitted that case to go to trial on gross negligence, and the facts are not remotely similar to *Blaisdell*. Penunuri's facts that establish her claim for gross negligence are spelled out in detail in the following section. Even if this Supreme Court of Utah determines that the "fixed by law" rule is disjunctive rather then conjunctive, the facts in this particular case do not support the summary judgment motion.

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[26] *See Id* at ¶13.
[27] *See Id* at ¶ 15
[28] *See Id.*
[29] *See Id.*
[30] *See Id* at ¶¶3, 15.
[31] *See Id* at ¶13
[32] *See Id* ¶¶ 15, 4.

II. *Reasonable Minds Could Determine That RMO Was Grossly Negligent*

The court of appeals erred in affirming the district court's determination that reasonable minds must conclude that there was no gross negligence under the circumstances. Summary judgment is appropriate only if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law.[33] An appellate court reviews a lower court's legal conclusions and ultimate grant or denial of summary judgment for correctness and views the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party.[34] Because negligence cases often require the drawing of inferences from the facts, which is properly done by juries rather than judges, summary judgment is appropriate in negligence and gross negligence cases only in the clearest instances.[35] Gross negligence is the failure to observe even slight care; it is carelessness or recklessness to a degree that shows utter indifference to the consequences that may result.[36]

Reasonable minds of a jury could find that facts and all reasonable inferences from the facts demonstrate that RMO was grossly negligent. The jury could and since it is undisputed will likely find that RMO's guide Ashley Wright had a duty to keep the gaps between her guests' horses at less than 32 feet (4 horse lengths) at all times (R. 590, 1253). The jury could find that at the time the guide came upon a steep incline, a sharp

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[33] See Penunuri, 2016 UT 3 at ¶ 15. See also Utah Rules of Civil Procedure, Rule 56.
[34] See Id.
[35] See Id.
[36] See Id at ¶16.

bend in the trail, and hikers hiding in the brush on the inside of the curve (the three simultaneous dangers on the trial) the standard of care required her to have shrunk the gaps to less than 16 feet (2 horse lengths). The guide could only have done this by stopping before passing the dangers to let the horses catch up (R. 947, 949-950). The jury could and will likely find that the guide breached her duty to Ms. Penunuri when the undisputed facts revealed that she permitted the gaps in the train of horses to grow to 125 feet, and failed to close the gaps down to 16 feet when she came upon the three additional dangers (*Id* and R. 1261).

The jury could find that the guide did not show slight care, and that she was careless or reckless to a degree that showed utter indifference to the consequences, when she continued riding on past the three dangers with gaps of 125 feet within her train of horses. The guide could be found to not have shown slight care, given the guide had yearly training for six years in a row where she was taught and knew that large gaps and dangers on the trail will cause horses to suddenly accelerate (R. 898, 1252), yet ignored her years of training and passed the three dangers with a 125 foot gap in her train of horses. The jury could find that the guide did not show slight care, when the guide ignored the pleas of other guest riders who were begging the guide to stop and let the trailing riders catch up, especially since she as the leader was the only person capable of closing the gaps when she came upon the three dangers (R. 848). Reasonable minds could believe Ms. Penunuri's expert that "but for" the gap of 125 feet, a gap greater than 16 feet, Ms. Penunuri's horse would not have suddenly accelerated and caused her to be thrown off her horse. Lastly, the jury will find that the uncontestable facts reveal that

Ms. Penunuri suffered a subluxation fractured neck at C5-C7 and spinal cord syndrom from the fall and was lifeflighted to Utah Regional Medical Center (R. 946, 948-949, 955).

The facts to support the gross negligence in this case are as follows: A guide must keep gaps in between the horses from 8 to 32 feet and anything beyond 32 feet will likely cause a horse to suddenly accelerate to catch up to the heard (R. 590, 1253, 941-942). There was a 125-foot gap in Guide Ashley's train of horses when Ms. Penunuri was thrown from her horse (R. 597, 1253). Penunuri presented evidence that RMO had a safety policy to keep large gaps from forming in the train of horses to protect the riders from being thrown off the horses (R. 898, 1252, 1575).

In particular, RMO's employee manual instructs its guides to:

> [t]ake your responsibility seriously. *Guests trust you with their safety and often with the safety of their children.* They look to you for experience, instruction, leadership, and knowledge. They also look to you for fun and entertainment. They look to you to make their experience exactly what they want it to be –fun, memorable, exciting, and *safe.* (R. 1252, 1575 p. 39).

In regards to keeping the ride safe, RMO's employee manual provided three simple safety instructions for the guides: keep gaps from forming; warn of obstacles such as hills and hikers; and keep the saddle from slipping, as follows:

> Once on the trail, it is the *guide's responsibility to continually watch over and monitor the safety* and comfort of his/her guests.
>
> 7. *Keep your ride in control.* Keep guests in site at all times possible. While there are times that they will be unseen constant interaction with guests will help keep a controlled environment.

8. ***Adjust your pace so that large gaps do not form between horses in your string. Gaps encourage horses to trot un-expectedly.***

9. ***Advise your guests of upcoming obstacles*** that may be difficult or intimidating. Teach them what to do and assure them they will be o.k. (***Up-hills,*** down hills, tree branch, logs, ***hikers,*** etc.)

10. *Continually remind guests of safety issues, re-teaching as you go.*

11. Re-assess the tightness of saddles and remind guests to inform you if they feel their saddle slipping from one side to the other.

12. ***Constantly have safety on your mind***! (*Emphasis added*) (R. 898, 1252, 1575 at p. 40,42).

The length of a horse is seven to eight feet. (R. 1009, 614, 958, 599). Every horseperson agreed that gaps should be less than 4 horse lengths or 32 feet, and in particular: Joseph Loveridge, the owner of RMO, testified that gaps should be no more than two to three horse lengths; Rex Walker, RMO's hired expert, testified that the gap should be kept at two to three horse lengths; Braydon Whiteley, a guide for RMO, testified that gaps should not extend beyond one to two horse lengths (R. 590, 1253). Penunuri's expert, Scott Earl's testimony, gives RMO the largest leeway, that on this ride and on this trail, the horses could have a gap of up to four horse lengths, (R. 1256), but clarified that when the guide Ashley came upon the three dangers, the steep section of trail, sharp curve and the hikers, the gap should not be more than two horse lengths or 16 feet. (R. 941-942). Specifically Penunuri's expert Scott Earl testified as follows:

Q. [by Burt Ringwood] And as she bends around the corner, is it a breach in the standard of care not to have waited, at that point, to have gotten all of those horses back together?

A. [by Plts' Expert, Mr. Earl] Yes.

Q. So at that point, even if they were three or four horse lengths apart, the fact of the matter is, she had to get them back to one or two right?

A. Yes, in my opinion, she should have.

Q. . . . It's a breach in her duty not to have gotten those back to one and two before she came around the danger, before she saw –

A. After *seeing the people and knowing there was danger*, yes.

Q. And so she breached her duty, at that point?

A. *Yes*.

Q. And at that point, she's negligent; is that correct?

A. That would be correct. (R. 941-942, p.89-90).

Mr. Earl also testified:

Q. . . . Third, Ashley further breached her duty to keep the riders safe when she failed to stop the moment she came around the bend in the trail where hikers were waiting in the bushes to let the horses pass. There should be no gaps in the horses at any time, but when the horse are coming upon a situation that could startle them, extra care should be taken to get the horses together before the straggling horses come upon the situation.

Now, your statement there, that there should be no gaps in the horses at any time. That's an impossibility; right?

A. No gaps as in, you know, you're going to have gaps. What is meant there, I guess it isn't written correctly, large gaps.

Q. And again, how would you define a large gap?

A. I would say at this point, you should be ***one to two horse lengths apart.***

Q. There are other points where it's okay to be further apart?

A. You should be one to two horse lengths apart at all times, ***but when you're coming up to a danger, to minimize any risks, make sure you're there.***

* * *

Q. ***And so you're saying is there should have been extra care to be taken to get the horses together before the straggling horses comes upon the situation?***

A. ***That is exactly what I'm saying.*** (R. 949-950, pp 57-59).

Mr. Earl also testified that the gaps caused Ms. Penunuri's rented horse to suddenly accelerate; that it was the "but for cause":

Q. . . . And then as I reread [your report], I realized what you are saying is just slow the train down and let everybody catch up and then [the hikers can] let the horses go by?

A. See, they can go by people, bridges, water crossings, you're better off to be together at a so-called danger. (R. 947, p 68 lines 10-16).

* * *

Q. Just for clarification, what do you believe caused Lisa [Penunuri] to fall off the horse?

A. ***I believe the large gaps, which allowed the horse to accelerate unexpectedly, that she lost her seating and fell.*** (R. 946. P 72 lines 14-18).

RMO's Guide Braydon Whiteley, is specifically familiar with RMO's horses, and testified that with RMO's horses, "three horse lengths is probably a bit too far, three to four horse lengths" (R. 644, 632, 1262). Braydon further testified that a gap of three to four horse lengths ***may*** likely cause RMO's horse to run unexpectedly and a gap of ten horse lengths (80 feet) ***will*** cause RMO's horses to accelerate unexpectedly (R. 644, 632, 1262). Joseph Loveridge testified that gaps greater than one to three horse lengths can cause a horse to trot unexpectedly, and that when a hiker is on the trail, it is even more important to keep the gaps closed (R. 590, 1254).

Where Ms. Penunuri landed, she was 102 feet behind Ms. Fort on the trail. (R. 597, 1261)(Ms. Fort went back to the trail and measured the exact distance). The guide Ashley testified that Ms. Penunuri's horse began to accelerate where the hikers were and 23 feet before she landed on the ground (R. 597, 1261). Therefore, the gap between the horses at the time Ms. Penunuri was thrown off was 125 feet (R. 1261). Defendants did not dispute the distance, rather stating the "exact distance between Ms. Fort's horse and [Ms. Penunuri's] horse when she fell, whether it was 102 feet or 125 feet, is immaterial for purposes of this [summary judgment] motion" (R. 1261). Just prior to Ms. Penunuri being thrown from her horse, another guest, Suzanne Moag requested that the guide stop to close the gaps (R. 848). The guide Ashley testified that she informed the guest that instead of stopping, she would continue riding another 100 feet up the trail (R. 614).

The jury could find that the facts support that RMO's guide acted without slight care and RMO was grossly negligent when RMO's guide permitted a gap of 125 feet to form in her train of horses, and yet continued to travel up the trail after the guide came upon three known simultaneous dangers in the trail. With the gap in place, the guide continued traveling when she reached a steep section of trail, took a sharp turn, and passed hikers waiting in the woods, and when Ms. Penunuri's horse came upon the three additional dangers, her horse suddenly and unexpectedly to her accelerated and threw her off because there was a 125 foot gap between her horse and the next. The guide was well aware that the combination of dangers and the 125-foot gap would cause Ms. Penunuri's horse to accelerate unexpectedly to Ms. Penunuri.

Slight care:

As it stands today, under the court of appeals' analysis in *Penunuri*, a defendant merely has to demonstrate that it showed slight care at sometime in the relationship between the defendant and the plaintiff that is unrelated to the actual negligence, or that it intended another result (i.e. pony up the horse) to avoid liability for its gross negligence.[37] If permitted to stand, then gross negligence would be impossible to establish regardless of the situation.[38] This is contrary to the Supreme Court of Utah's findings in *Berry*. In *Berry*, the defendant alleged it had shown slight care, by requiring the skiers to wear helmets, using blue paint to mark takeoff points of the jumps, had speed gates and berms to slow down the racers, and safety barriers.[39] The plaintiff was required to "slip" the course twice to familiarize himself with the course.[40] Even though these facts were somewhat related to the negligent act, none of these facts were relevant to the Supreme Court's analysis since there was no applicable standard of care to ground the analysis.[41]

In this present appeal, the court of appeals determined that "the guide did observe, at the very least, slight care: she gave Penunuri instructions on how to mount the horse and how to stop the horse from grazing, she had been "slowing down the whole ride"[42]

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[37] See Id at ¶ 28

[38] A drunk driver involved in an accident could escape gross negligence just by showing that he was following the speed limit.

[39] *See Berry*, 2007 UT 87 at ¶4.

[40] *See Id*

[41] *See Id* at ¶30.

[42] The statement that the guide was "slowing down the whole ride" was never made in RMO's opening memorandum, but was only presented in RMO's reply in response to a

for Penunuri and Child and she planned to take the reins of Child's horse once the riders reached a suitable area to rearrange the order of the riders."[43] These moments of slight care have nothing to do with the moment when the guide Ashley committed the gross negligence. The guide Ashley did not show slight care and acted with utter indifference when she simultaneously climbed a steep section of trail, rounded a sharp turn, and passed hikers hiding in the bushes on the inside of the turn ("three dangers") and yet continued on up the trail. The guide did not stop and close the 125-foot gap but she continued with utter indifference to the consequences of the gaps while ignoring the pleas of the fellow guests to stop to let Ms. Penunuri catch up. When the guide came upon the three dangers the 125-foot gap was already present. Whether or not Ms. Penunuri knew how to mount the horse, learned how to stop the horse from grazing, or if the guide was slowing down or that she intended to pony up the child, does not show the guide exhibited slight care at the moment of the negligence, when the guide came upon the three dangers and did not stop with a 125-foot gap in the train of horses. The guide was the only person who could have closed the gaps before Ms. Penunuri's horse came upon the same three dangers with a 125-foot gap in front of her horse.

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fact that Ms. Penunuri made in her opposition to the MSJ in the trial court. It was never argued or brought up during oral argument and, other than as a response to one of plaintiff's undisputed facts, it was never presented in the body of the Reply's argument section. It should have never made its way as an undisputed fact as found by the trial court, and it certainly does not negate the fact that there was a 125 foot gap at the time the guide passed three dangers and she was at that moment required to stop the train of horses and close the gap (R. 1259-1260). This statement is contrary to the guide's own testimony that Ms. Penunuri was moving. (R. 614) It also makes little sense, the trip was a two hour ride, they were well past half way and a rider can only slow a horse down so much, before it would come to a stop.

[43] *See Penunuri*, 2016 UT App. 154 at ¶28.

For example, an analogy in medicine would be a surgeon who has a patient present with signs of liver malfunction. The surgeon performs a CT scan that shows a tumor on the liver. The standard of care before performing the surgery is to perform a CT scan, nonetheless the surgeon goes beyond what is required and also performs an MRI. The surgeon meets with the patient fifteen to twenty times to make sure that surgery is the right option. The surgeon talks at length with the patient and family and in great detail explains the procedure and the potential complications. He explains that without the surgery the patient would die from the tumor within 20 to 30 years. Ultimately the surgeon, the patient, and family elect to go forward with the surgery. The surgeon acted at least with slight care up to this point.

The surgeon performs the surgery and leaves a scalpel in the patient. Immediately after the surgery he recognizes that he left the scalpel in the patient. He has an opportunity to stop what he is doing at that moment and reopen the patient and immediately retrieve the scalpel. He knows that if he does the patient will live but if he leaves the scalpel it will soon kill the patient. Nonetheless, he decides that he will wait until morning to remove the scalpel. As expected the patient dies in the night. Because of *Penunuri,* the patient's family does not get the gross negligence in front of the jury.

Pursuant to *Penunuri v. Sundance Partners LTD*,[44] that surgeon could not be sued for gross negligence because, like in *Penunuri*, he showed slight care before he started the surgery and before he was grossly negligent, even though the patient, like in *Penununri*, had no control over the negligent act or in this instance at the moment the

[44] 2016 UT App. 154, 380 p.3d 3 (2016)

surgeon chose to leave the scalpel. Additionally, the surgeon could not be held for gross negligence because, like in *Penunuri*, he did not intend to harm or kill the patient but intended a different outcome. Like in Penunuri, he intended to correct the problem later, he intended to go in after the scalpel the following day just as the guide intended to pony up the child later. Pursuant to *Penunuri*, the trial court would have to dismiss the gross negligence claims, because at some time when the surgeon was taking care of the patient he showed slight care or intended slight care, even though the slight care was unrelated to the negligence. Slight care has to be somehow connected to the moment of negligence.

III. ***The Court of Appeals Erred in Affirming the District Court's Award of Deposition Costs to RMO.***

The court of appeals erred in affirming the district court's award of deposition costs to RMO. Costs were not recoverable at common law; and are therefore generally allowable only in the amounts and in the manner provided by statute.[45] The trial court has a duty to guard against excesses or abuses in the taxing of costs.[46] The Frampton court recognized that taxing the expenses of depositions has "been a matter of some controversy in this jurisdiction."[47] To award deposition costs, "the district court 'must find that the depositions were essential because they were used in a ***meaningful way at trial***, or because the development of the case was of such a complex nature that the

[45] *See Frampton v. Wilson*, 605 P.2d 771, 773 (Utah 1980).
[46] *See Id* at 774.
[47] *See Id.*

information in the deposition could not be obtained through less expensive means of discovery.'"[48] In *Young v. State*, the Supreme Court ruled,

> to be taxable as costs, depositions *need not be used at trial, **provided** other criteria are met*. In applying the general rule in Board Commissioners of the Utah State Bar, we stated, 'This is not to say that the costs of taking a deposition can never be recovered when the deposition is not used at trial. We have stated that 'we would allow deposition costs as necessary and reasonable where the development of the case is such a complex nature that discovery cannot be accomplished through less expensive methods of interrogatories, requests for admissions, and requests for the production of documents.'[49]

This case did not go to trial, it was decided on a motion for summary judgment. Without a statute to give costs for depositions used in summary dispositions, the trial court was required to find that "the development of the case was of such a complex nature that the information in the deposition could not be obtained through less expensive means of discovery."[50]

In fact, the court of appeals addressed this issue and recognized "the district court did not decide that the depositions were essential 'because the development of the case was of such a complex nature that the information in the depositions could not be obtained through less expensive means of discovery.' In fact, the court stated 'I haven't really reached a conclusion as to whether or not this case was of such a complex nature that . . . less expensive discovery could have been obtain."[51] Therefore, since there was no trial, the court of appeals erred when it affirmed the trial court's award of costs

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[48] *See Penunuri*, 2016 UT App. 154, at ¶ 37, quoting *Young v. State*, 2000 UT 91, ¶11 16 P.3d 549.
[49] *See Young*, 2000 UT 91 at ¶7.
[50] *See Id.*
[51] *See Penunuri,* 2016 UT App. 154 at ¶38 .

without a finding from a trial court that the discovery could not be obtained by a less expensive means of discovery.

The trial court erred when it determined that RMO was entitled to the deposition costs in the amount of $2,577.32, together with post judgment interests, when the same evidence could have been obtained through less expensive means. U.R.C.P. Rule 54(d) governs costs. The relevant portion of Rule 54 provides: "

> The party who claims costs. . . [must] file with the court a like memorandum thereof duly verified stating that to affiants knowledge . . . the disbursements have been *necessarily* incurred in the proceeding.[52]

The Supreme Court of Utah determined that a party:

> seeking costs must show the depositions were so essential to the case that the information provided by the deposition *could not* have been obtained through less expensive means of discovery.[53]

> The Utah Supreme Court has stated that there is a distinction to be understood between legitimate and taxable costs and other expenses of litigation which *may ever be* so necessary, but are not taxable costs.[54]

Costs are only those that are absolutely necessary.[55] RMO contended they needed Ms. Penunuri's deposition as it was:

> used in summary judgment briefs to establish that she had been presented with and signed the Horseback Riding Release which warned her of the "Inherent Risks" associated with horseback riding; and that she was not confused by or sought any clarification concerning the language of the Horseback Riding Release; that she was of legal age and capacity to execute the Horseback Riding Release. Ms. Penunuri's deposition was also used to establish her version of the facts leading up to and including her fall from the horse. (R. at 1444).

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[52] *See* Utah R. Civ. P. Rule 54(b)
[53] *See Jensen v. Sawyer,* 2005 UT 81, at ¶139,
[54] *Id* at ¶141, FN 14
[55] *Id* at ¶130.

These facts from Ms. Penunuri could have been obtained through interrogatories and the deposition was therefore not essential.

Kate Fort was a rider on the trail and the mother of Haley Fort; RMO contended that:

> Ms. Fort's deposition testimony was used in the parties' summary judgment briefing to establish the events leading up to the accident, the instructions that were given to participants during the ride and facts leading up to Ms. Penunuri's fall. (R. at 1443)

In regards to Suzanne Moag, RMO claims:

> Ms. Moag's deposition testimony was used in the parties' summary judgment briefing to establish that instructions had been given to participants on the ride and that RMO's guide Ashley Wright, had informed the participants that after the group reached a clearing, she would go back to pony Haley Fort's horse the remainder of the ride to help keep the group together and to prevent it from stopping to graze. (R. at 1443)

RMO obtained most of these facts shortly after Ms. Penunuri was thrown from the horse from statements attached to the incident report. Ms. Fort and Ms. Moag voluntarily filled out an incident form provided to them by RMO. There was no reason that RMO could not have created a declaration or affidavit having the same effect as a deposition or interrogatories to Ms. Penunuri.

* * *

* * *

CONCLUSION

For the foregoing reasons, Ms. Penunuri respectfully request that this Supreme Court of Utah find in her favor and reverse the Court of Appeals and remand this case for trial. Ms. Penunuri also requests that this Supreme Court reverse the costs awarded to RMO.

Respectfully submitted this 9th day of December 2016.

STRIEPER LAW FIRM

s/s Robert Strieper

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Attorney for Plaintiff/Appellants

Requirements

I hereby certify that this brief complies with the type volume limitations of Utah R. App. P 24(1)(A) because the brief contains 10,256 words excluding parts of the brief exempt by Utah Rules App. P. 24(f)(1)(B) This brief complies with the typeface requirements of Utah Rules Appellate Procedure 27(b) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2013 in 13 point Times New Roman font.

and

MAILING CERTIFICATE

I hereby certify that on this 9th day of December 2016, I caused to be hand delivered two true and correct hard copies and one CD of the Brief of Appellants and to be served on Appellees:

A.J. Sano
Burt Ringwood
STRONG & HANNI
102 South 200 East, Suite 800
Salt Lake City, UT 84111

s/s Robert Strieper

Addendum A

Utah Rules of Civil Procedure, Rule 54

RULE 54. JUDGMENTS; COSTS

Currentness

(a) Definition; form. "Judgment" as used in these rules includes a decree or order that adjudicates all claims and the rights and liabilities of all parties or any other order from which an appeal of right lies. A judgment should not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) Judgment upon multiple claims and/or involving multiple parties. When an action presents more than one claim for relief--whether as a claim, counterclaim, cross claim, or third party claim--and/or when multiple parties are involved, the court may enter judgment as to one or more but fewer than all of the claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties, and may be changed at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for judgment. A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.

(d) Costs.

(d)(1) *To whom awarded.* Unless a statute, these rules, or a court order provides otherwise, costs should be allowed to the prevailing party. Costs against the state of Utah, its officers and agencies may be imposed only to the extent permitted by law.

(d)(2) *How assessed.* The party who claims costs must not later than 14 days after the entry of judgment file and serve a verified memorandum of costs. A party dissatisfied with the costs claimed may, within 7 days after service of the memorandum of costs, object to the claimed costs.

(d)(3) *Memorandum filed before judgment.* A memorandum of costs served and filed after the verdict, or at the time of or subsequent to the service and filing of the findings of fact and conclusions of law, but before the entry of judgment, is deemed served and filed on the date judgment is entered.

(e) Amending the judgment to add costs or attorney fees. If the court awards costs under paragraph (d) or attorney fees under Rule 73 after the judgment is entered, the prevailing party must file and serve an amended judgment including

the costs or attorney fees. The court will enter the amended judgment unless another party objects within 7 days after the amended judgment is filed.

Credits

[Amended effective January 1, 1985; November 1, 2003; November 1, 2011; May 1, 2014; November 1, 2015; November 1, 2016.]

Rules Civ. Proc., Rule 54, UT R RCP Rule 54
Current with amendments received through September 15, 2016.

End of Document

Utah Rules of Civil Procedure, Rule 56

RULE 56. SUMMARY JUDGMENT

Currentness

(a) Motion for summary judgment or partial summary judgment. A party may move for summary judgment, identifying each claim or defense--or the part of each claim or defense--on which summary judgment is sought. The court shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion. The motion and memoranda must follow Rule 7 as supplemented below.

(a)(1) Instead of a statement of the facts under Rule 7, a motion for summary judgment must contain a statement of material facts claimed not to be genuinely disputed. Each fact must be separately stated in numbered paragraphs and supported by citing to materials in the record under paragraph (c)(1) of this rule.

(a)(2) Instead of a statement of the facts under Rule 7, a memorandum opposing the motion must include a verbatim restatement of each of the moving party's facts that is disputed with an explanation of the grounds for the dispute supported by citing to materials in the record under paragraph (c)(1) of this rule. The memorandum may contain a separate statement of additional materials facts in dispute, which must be separately stated in numbered paragraphs and similarly supported.

(a)(3) The motion and the memorandum opposing the motion may contain a concise statement of facts, whether disputed or undisputed, for the limited purpose of providing background and context for the case, dispute and motion.

(a)(4) Each material fact set forth in the motion or in the memorandum opposing the motion under paragraphs (a)(1) and (a)(2) that is not disputed is deemed admitted for the purposes of the motion.

(b) Time to file a motion. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may move for summary judgment at any time after service of a motion for summary judgment by the adverse party or after 21 days from the commencement of the action. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may move for summary judgment at any time. Unless the court orders otherwise, a party may file a motion for summary judgment at any time no later than 28 days after the close of all discovery.

(c) Procedures.

(c)(1) *Supporting factual positions.* A party asserting that a fact cannot be genuinely disputed or is genuinely disputed must support the assertion by:

(c)(1)(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(c)(1)(B) showing that the materials cited do not establish the absence or presence of a genuine dispute.

(c)(2) *Objection that a fact is not supported by admissible evidence.* A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(c)(3) *Materials not cited.* The court need consider only the cited materials, but it may consider other materials in the record.

(c)(4) *Affidavits or declarations.* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, must set out facts that would be admissible in evidence, and must show that the affiant or declarant is competent to testify on the matters stated.

(d) When facts are unavailable to the nonmoving party. If a nonmoving party shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(d)(1) defer considering the motion or deny it without prejudice;

(d)(2) allow time to obtain affidavits or declarations or to take discovery; or

(d)(3) issue any other appropriate order.

(e) Failing to properly support or address a fact. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by paragraph (c), the court may:

(e)(1) give an opportunity to properly support or address the fact;

(e)(2) consider the fact undisputed for purposes of the motion;

(e)(3) grant summary judgment if the motion and supporting materials--including the facts considered undisputed--show that the moving party is entitled to it; or

(e)(4) issue any other appropriate order.

(f) Judgment independent of the motion. After giving notice and a reasonable time to respond, the court may:

(f)(1) grant summary judgment for a nonmoving party;

(f)(2) grant the motion on grounds not raised by a party; or

(f)(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) Failing to grant all the requested relief. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact--including an item of damages or other relief--that is not genuinely in dispute and treating the fact as established in the case.

(h) Affidavit or declaration submitted in bad faith. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court--after notice and a reasonable time to respond--may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. The court may also hold an offending party or attorney in contempt or order other appropriate sanctions.

Credits

[Amended effective November 1, 1997; November 1, 2004; May 1, 2014. Repealed and re-enacted effective November 1, 2015.]

Rules Civ. Proc., Rule 56, UT R RCP Rule 56
Current with amendments received through September 15, 2016.

Addendum B

380 P.3d 3
Court of Appeals of Utah.

Lisa Penunuri and Barry Siegwart, Appellants,
v.
Sundance Partners Ltd., Sundance Holdings LLC, Sundance Development Corporation, Robert Redford, Redford 1970 Trust, and Rocky Mountain Outfitters LC, Appellees.

No. 20140854–CA
|
Filed July 21, 2016

Synopsis

Background: Participant in guided horseback ride brought action against operator for gross negligence for guide's conduct, alleging participant fell from horse when horse suddenly accelerated to catch up with group after it had been grazing. The Fourth District Court, Provo Department, Claudia Laycock, J., entered summary judgment in favor of operator. Participant appealed.

Holdings: The Court of Appeals, J. Frederic Voros, J., held that:

[1] guide did not fail to observe even slight care or act with utter indifference, as required to establish gross negligence claim, and

[2] award of $2,577.32 in deposition costs to operator was not an abuse of discretion.

Affirmed.

West Headnotes (9)

[1] **Judgment**
Tort cases in general

Because negligence cases often require the drawing of inferences from the facts, which is properly done by juries rather than judges, summary judgment is appropriate in negligence cases only in the clearest instances. Utah R. Civ. P. 56(a).

Cases that cite this headnote

[2] **Negligence**
Gross negligence

"Gross negligence" is the failure to observe even slight care; it is carelessness or recklessness to a degree that shows utter indifference to the consequences that may result.

Cases that cite this headnote

[3] **Negligence**
Gross negligence

Gross negligence, which is associated with willful, wanton, and reckless conduct, applies to conduct that is so far from a proper state of mind that it is treated in many respects as if harm was intended and usually is accompanied by a conscious indifference to consequences.

Cases that cite this headnote

[4] **Animals**
Horses and other equines

Guide who led horseback ride did not fail to observe even slight care or act with utter indifference, as required to establish gross negligence claim brought by participant in guided horseback ride alleging that she fell from horse when it suddenly accelerated to catch up with group after it had been grazing, where guide gave instructions to participant on how to mount horse and how to stop horse from grazing, guide slowed down the whole ride for participant and a child participant, whose horse had been grazing too, and guide planned to take reins of child's horse once participants reached a suitable area to do so.

Cases that cite this headnote

[5] **Negligence**
Gross negligence

Gross negligence requires proof of conduct substantially more distant from the appropriate standard of care than does ordinary negligence.

Cases that cite this headnote

[6] **Costs**
Depositions and affidavits

Trial court did not abuse its discretion in awarding deposition costs in the amount of $2,577.32 to horseback riding operator for depositions of participants in guided horseback ride, after granting summary judgment in favor of operator in gross negligence action alleging that participant fell from horse when horse suddenly accelerated to catch up with group after it had been grazing, where court found that depositions were used in a meaningful way in establishing undisputed facts for purposes of operator's summary judgment motion, that depositions were required to obtain participants' testimony, and that depositions were taken in good faith and appeared to have been essential for development and presentation of case. Utah R. Civ. P. 54(d)(1), 56(a).

Cases that cite this headnote

[7] **Appeal and Error**
Review of Specific Questions and Particular Decisions

In reviewing a district court's denial or award of costs, the Court of Appeals applies a highly deferential standard. Utah R. Civ. P. 54(d).

Cases that cite this headnote

[8] **Costs**
Depositions and affidavits

The general rule regarding the recovery of deposition costs is that a party may recover deposition costs as long as the trial court is persuaded that the depositions were taken in good faith and, in the light of the circumstances, appeared to be essential for the development and presentation of the case. Utah R. Civ. P. 54(d)(1).

Cases that cite this headnote

[9] **Costs**
Depositions and affidavits

In awarding deposition costs, the district court must find that the depositions were essential because they were used in a meaningful way at trial, or because the development of the case was of such a complex nature that the information in the depositions could not be obtained through less expensive means of discovery. Utah R. Civ. P. 54(d)(1).

Cases that cite this headnote

*4 Fourth District Court, Provo Department, The Honorable Claudia Laycock, No. 080400019

Attorneys and Law Firms

Robert D. Strieper, Salt Lake City, Attorney for Appellants.

H. Burt Ringwood, Sandy and A. Joseph Sano, Salt Lake City, Attorneys for Appellees.

Judge J. Frederic Voros Jr. authored this Opinion, in which Judge Michele M. Christiansen and Senior Judge Russell W. Bench concurred. [1]

Opinion

VOROS, Judge:

*5 ¶1 Plaintiffs Lisa Penunuri and Barry Siegwart appeal the district court's entry of summary judgment in favor of Rocky Mountain Outfitters LC and the other defendants (collectively, Rocky Mountain). Penunuri suffered injuries when she fell from her horse on a guided trail ride. On that ride, potentially dangerous gaps formed between horses. Rather than addressing these gaps immediately, the trail guide decided to deal with them after the company had passed some hikers and reached a

clearing. But before they did, Penunuri fell off her horse. Plaintiffs sued Rocky Mountain and related parties for ordinary negligence and gross negligence.

¶2 The district court ruled that a release signed by Penunuri barred the ordinary negligence claim. This court and the Utah Supreme Court upheld that ruling in a prior appeal. On remand, the district court rejected the gross negligence claim on summary judgment. We agree with the district court that this set of facts cannot as a matter of law support a claim of gross negligence. Accordingly, we affirm.

BACKGROUND[2]

¶3 On August 1, 2007, Penunuri joined a guided horseback trail ride operated by Rocky Mountain at Sundance Resort. Her group consisted of a guide and four other riders: Penunuri's two friends, an eight-year-old child (Child), and Child's mother (Mother). Before beginning the ride, Penunuri and the other riders received instruction from the guide and signed liability releases. The guide worked as a horseback trail guide for Rocky Mountain from summer 2004 to fall 2008. She was trained by Rocky Mountain at the beginning of each season to guide horseback trail rides. Rocky Mountain instructed guides to close up large gaps between horses as they walked and to warn riders about hazards on the trail.

¶4 The riders left the stables riding single file. Throughout the ride, the guide rode at the head of the group. For the first 45 minutes, Mother, Child, and Penunuri were the first three riders, followed by Penunuri's friends. After stopping at a meadow, the order of the riders changed. Penunuri's friends rode behind the guide, while Mother, Child, and Penunuri brought up the rear. Both Child and Penunuri struggled to keep their horses from grazing. The grazing caused Child's and Penunuri's horses to lag behind, creating gaps between the horses.

¶5 The guide tried to keep the group together by slowing down. One of Penunuri's friends asked the guide to stop and wait for Child and Penunuri to catch up. The guide responded that they would be stopping at a clearing about 100 feet away so that she could take the reins of Child's horse. To reach the clearing, the horses had to climb a steep section of the trail around a bend where hikers were present. Child's horse again stopped to graze, creating a gap of several feet between Penunuri and the rest of the group. When Child's and Penunuri's horses began moving again, Penunuri testified that "it was a rougher ride than [she] remember[ed] having had before." She testified that "with other grazing episodes my horse would, you know, kind of giddyup a little faster than it had been going, because [Child's] horse would start up and then mine would start up, too, and then would slow down. And this particular incident, it seemed even rougher than, you know, the giddyup that I had gotten in other stops." Her horse suddenly accelerated and Penunuri fell off, suffering injuries.

¶6 Plaintiffs sued Rocky Mountain alleging ordinary negligence, gross negligence, and vicarious liability. Plaintiffs filed a motion for partial summary judgment and declaratory relief. They argued that a release Penunuri had signed was unenforceable under the Limitations on Liability for Equine and Livestock Activities Act. The district court concluded that the Act did not prevent a party from contracting away its liability for ordinary ***6** negligence. The court accordingly ruled the release enforceable and dismissed all of Plaintiffs' claims based on ordinary negligence. This court and the Utah Supreme Court affirmed the district court's ruling. *See Penunuri v. Sundance Partners, Ltd.*, 2013 UT 22, 301 P.3d 984; *Penunuri v. Sundance Partners, Ltd.*, 2011 UT App 183, 257 P.3d 1049.

¶7 On remand, Plaintiffs pursued their gross negligence claim. Rocky Mountain filed two motions for summary judgment, the first to dismiss Plaintiffs' gross negligence claim and the second, in the alternative, to exclude Plaintiffs' proposed expert witness. The court granted both motions, dismissing the gross negligence claim and ruling that Plaintiffs' proposed expert was "not qualified to render expert opinion testimony concerning the standard of care applicable to commercial horseback trail guiding." The court also awarded Rocky Mountain costs pursuant to rule 54 of the Utah Rules of Civil Procedure. Plaintiffs appeal.

ISSUES ON APPEAL

¶8 First, Plaintiffs contend that the district court erred when it granted summary judgment to Rocky Mountain in a gross negligence case where the standard of care was not fixed by law.

¶9 Second, Plaintiffs contend that the district court erred when it determined that no facts supported their claims of gross negligence.

¶10 Third, Plaintiffs contend that the district court "erred when it determined the outcome of the entire case based upon one alleged, disputable fact."

¶11 Fourth, Plaintiffs contend that the district court erred when it "granted [Rocky Mountain's] motion for summary judgment on causation based upon mischaracterization of deposition testimony."

¶12 Fifth, Plaintiffs contend that the district court erred when it granted Rocky Mountain's alternative motion for summary judgment and excluded testimony from Plaintiffs' proposed expert witness. Because our resolution of Plaintiffs' first four claims on appeal renders this claim moot, we do not consider its merits.

¶13 Finally, Plaintiffs contend that the district court abused its discretion when it awarded Rocky Mountain costs.

ANALYSIS

I. The District Court Properly Granted Rocky Mountain's Summary Judgment Motion Relating to Gross Negligence.

¶14 Plaintiffs' first four contentions each challenge the district court's granting of Rocky Mountain's first motion for summary judgment. The district court granted the motion on the ground that Plaintiffs "presented no evidence upon which reasonable minds could conclude that [Rocky Mountain's] guide ... exercised no care."

[1] ¶15 Summary judgment is appropriate "if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56(a). "An appellate court reviews a trial court's legal conclusions and ultimate grant or denial of summary judgment for correctness, and views the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." *Orvis v. Johnson*, 2008 UT 2, ¶ 6, 177 P.3d 600 (citations and internal quotation marks omitted). "[B]ecause negligence cases often require the drawing of inferences from the facts, which is properly done by juries rather than judges, summary judgment is appropriate in negligence cases only in the clearest instances." *Castellanos v. Tommy John, LLC*, 2014 UT App 48, ¶ 7, 321 P.3d 218 (citation and internal quotation marks omitted).

[2] **[3]** ¶16 "Gross negligence is 'the failure to observe even slight care; it is carelessness or recklessness to a degree that shows utter indifference to the consequences that may result.' " *Pearce v. Utah Athletic Found.*, 2008 UT 13, ¶ 24, 179 P.3d 760 (quoting *Berry v. Greater Park City Co.*, 2007 UT 87, ¶ 26, 171 P.3d 442). Further, "gross negligence, which is associated with willful, wanton, and reckless conduct, applies to conduct that is so far from a proper state of mind *7 that it is treated in many respects as if harm was intended and usually is accompanied by a conscious indifference to consequences." *Blaisdell v. Dentrix Dental Sys., Inc.*, 2012 UT 37, ¶ 16, 284 P.3d 616 (citation and internal quotation marks omitted).

¶17 First, Plaintiffs contend that the district court erred when it granted summary judgment to Rocky Mountain in a gross negligence case where the standard of care was not fixed by law. They argue that the "standard of care regarding how a guide manages gaps in the train of horses is not fixed by law" and that it was therefore "inappropriate for the [district] court to grant the summary judgment motion."

¶18 Plaintiffs rely on the Utah Supreme Court's opinions in *Berry v. Greater Park City Co.*, 2007 UT 87, 171 P.3d 442, and *Pearce v. Utah Athletic Foundation*, 2008 UT 13, 179 P.3d 760. The *Berry* court stated a two-part guideline for summary judgment in negligence cases:

> [S]ummary judgment is " 'inappropriate unless the applicable standard of care is fixed by law, and reasonable minds could reach but one conclusion as to the defendant's negligence under the circumstances.' "

Berry, 2007 UT 87, ¶ 27, 171 P.3d 442 (quoting *White v. Deseelhorst*, 879 P.2d 1371, 1374 (Utah 1994) (quoting *Wycalis v. Guardian Title of Utah*, 780 P.2d 821, 825 (Utah Ct. App. 1989))). Plaintiffs read this passage to mean that summary judgment may never be granted in negligence cases unless *both* the standard of care is "fixed by law" *and* reasonable minds could not differ as to the defendant's

negligence. And to be sure, the passage does describe the two elements in the conjunctive.

¶19 But that is not how our supreme court has read *Berry*. Utah courts grant summary judgment with some frequency in negligence cases—usually against the plaintiff—where the standard of care is not "fixed by law" in the sense that the defendant violated a statute or precedent specific to the industry or practice at issue. And our supreme court, citing *Berry*, did that very thing in *Blaisdell v. Dentrix Dental Systems, Inc.*, 2012 UT 37, 284 P.3d 616.

¶20 In *Blaisdell*, a dentist sued a software provider for gross negligence. *Id.* ¶ 2. The court affirmed the district court's grant of summary judgment in favor of the defendant. The plaintiff argued on appeal, quoting *Berry*, that "summary judgment is inappropriate on the issue of gross negligence unless there is a 'standard of care ... fixed by law.' " *Id.* ¶ 14 (quoting *Berry*, 2007 UT 87, ¶ 30, 171 P.3d 442). But the court, also citing *Berry*, disposed of the claim under the rule that summary judgment "is generally inappropriate to resolve negligence claims and should be employed only in the most clear-cut case." *Id.* ¶ 15 (quoting *Berry*, 2007 UT 87, ¶ 27, 171 P.3d 442). And despite the absence of any law fixing the standard of care for providers of dental practice management software, the supreme court affirmed on the ground that reasonable minds could not differ as to whether the defendant's conduct in that case was grossly negligent (it wasn't). *Id.* ¶ 16. In other words, the supreme court read the *Berry* test as if the two factors were disjunctive rather than conjunctive elements.

¶21 We conclude that the supreme court's application of the two-part test in *Blaisdell* represents the original and best reading of that test. The two-part test came to Utah via *Wycalis v. Guardian Title of Utah*, 780 P.2d 821 (Utah Ct. App. 1989). *Wycalis* stated the test this way:

> Accordingly, summary judgment is inappropriate unless the applicable standard of care is "fixed by law," and reasonable minds could reach but one conclusion as to the defendant's negligence under the circumstances.

Id. at 825 (quoting *Elmer v. Vanderford*, 74 Wash.2d 546, 445 P.2d 612, 614 (1968)). But *Elmer v. Vanderford*, the source of the "fixed by law" formulation, states the test in the disjunctive. It identifies "two classes of cases in which the question of negligence may be determined by the court as a conclusion of law." *Elmer*, 445 P.2d at 614 (citation and internal quotation marks omitted). In the first class of cases, "the standard of duty is fixed, and the measure of duty defined, by law, and is the same under all circumstances." *Id.* (citation and internal quotation ***8** marks omitted). In the second, "the facts are undisputed and but one reasonable inference can be drawn from them." *Id.* (citation and internal quotation marks omitted). In effect, this is an alternative formulation of our rule 56. *See* Utah R. Civ. P. 56.

¶22 Thus, both as originally promulgated and as actually employed by our supreme court, under the fixed-by-law formulation a district court must grant summary judgment if, based on undisputed facts and under the governing legal standard, reasonable minds could not differ as to whether the defendant acted negligently. In any event, we look to the governing standard in rule 56: "The court shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." *Id.* And that is the case here.

¶23 Consequently, we hold that *Berry* did not require the district court to deny Rocky Mountain's summary judgment motion on the ground that the standard of care governing "how a guide manages gaps in the train of horses" on commercial trail rides is not fixed by law. The district court handled the gross negligence claim here just as the supreme court handled the gross negligence claim in *Blaisdell*.

[4] ¶24 Second, Plaintiffs contend that the district court "erred when it determined there were no facts to support [Plaintiffs'] gross negligence claim." Specifically, Plaintiffs argue that the court "chose to ignore [Rocky Mountain's] employee manual," which instructed its guides to "keep gaps from forming, warn of obstacles such as hills and hikers, and keep the saddle from slipping."

¶25 The district court ruled that Plaintiffs "presented no evidence upon which reasonable minds could conclude that [Rocky Mountain's] guide ... exercised no care." It further ruled that Plaintiffs did not present "any evidence to show that [the guide] knew or had reason to know of facts that would have created a high risk of physical harm

to ... Penunuri, but deliberately proceeded to act, or failed to act, in conscious disregard of, or indifference to, that risk." And, the court concluded, without any evidence of the guide's gross negligence—in other words, without any evidence that she acted with "utter indifference" to Penunuri's safety during the horseback ride—"reasonable minds could reach but one conclusion": that the guide was not grossly negligent. *See Pearce v. Utah Athletic Found.*, 2008 UT 13, ¶ 24, 179 P.3d 760 (citation and internal quotation marks omitted).

[5] ¶26 As previously explained, "[g]ross negligence requires proof of conduct substantially more distant from the appropriate standard of care than does ordinary negligence." *Berry v. Greater Park City Co.*, 2007 UT 87, ¶ 26, 171 P.3d 442. It "is 'the failure to observe even slight care; it is carelessness or recklessness to a degree that shows utter indifference to the consequences that may result.' " *Pearce*, 2008 UT 13, ¶ 24, 179 P.3d 760 (quoting *Berry*, 2007 UT 87, ¶ 26, 171 P.3d 442). Therefore, for Plaintiffs' claim to survive Rocky Mountain's summary judgment motion, the facts had to be capable of supporting a finding that Rocky Mountain's guide failed "to observe even slight care" and acted with "utter indifference to the consequences that may result." *Id.* (citation and internal quotation marks omitted).

¶27 Plaintiffs argue that Rocky Mountain's employee manual's warning about gaps as well as testimony from Rocky Mountain employees about the potential problems when gaps form "should have created a rebuttable presumption of negligence." Plaintiffs do not support this argument with legal authority stating that internal training manuals may define a standard of care.[3] But even if that assertion were true, it is not relevant. Plaintiffs cannot succeed by showing that the evidence would support a finding of *ordinary negligence*; their claim alleges *gross negligence*. And even they do not contend that the manual demonstrates that the guide exercised no care and acted with utter indifference to the consequences of her actions.

¶28 Furthermore, we agree with the district court that, even resolving all inferences in Plaintiffs' favor, the evidence could not support a finding of gross negligence. On the *9 contrary, the facts indisputably show that the guide did observe, at the very least, slight care: she gave Penunuri instructions on how to mount the horse and how to stop the horse from grazing, she had been "slowing down the whole ride" for Penunuri and Child, and she planned to take the reins of Child's horse once the riders reached a suitable area to rearrange the order of the riders. In addition, Plaintiffs' own proposed expert "testified that there is no evidence in this case indicating that [Rocky Mountain's] guide ... exercised no care or acted in willful disregard for the care of others."[4] In sum, the undisputed evidence before the court could not sustain a jury finding of gross negligence.

¶29 Third, Plaintiffs contend that the district court "erred when it determined the outcome of the entire case based upon one alleged, disputable fact." Plaintiffs argue that the district court granted Rocky Mountain's motion for summary judgment based on the "guide's testimony that she was slowing down the entire ride." Plaintiffs further argue that the guide's "failure to stop the moment she came upon the hikers to close the gaps that had formed" breached the standard of care.

¶30 We do not read the district court's ruling so narrowly. True, the court prominently cited the guide's testimony that she "had been slowing down the whole ride." But the court also cited the fact that the guide "was attempting to get the group to a larger clearing" to take the reins of Child's horse, as well as Plaintiffs' own proposed expert's testimony that the guide had not "exercised no care."

¶31 Moreover, we agree with the district court's characterization of the guide's testimony as undisputed. The guide testified, "I had been slowing down the whole ride." Plaintiffs argue that this testimony "is fully contradicted by the facts that the trial court disregarded." Plaintiffs refer to testimony that the guide "just march[ed] on at a normal speed" and did not stop when requested. But the page of the record Plaintiffs cite in support of this assertion does not support it. The witness testified as follows: "I told [the guide] that we had to wait up, to stop. And she said that we would stop at the clearing farther on and that she would pony [Child] in." This testimony does not contradict the guide's testimony that she had been slowing down the whole ride. Accordingly, the court's summary judgment does not rest on a single disputed fact.

¶32 In addition, Plaintiffs cite other testimony from which they allege that a finder of fact could conclude that the guide knew the potential danger of gaps between horses, knew that gaps had formed in this company, and decided to close those gaps only after the group got past the foot

traffic and bends in the trail. But, as explained above, this testimony would at most support a claim for ordinary negligence. Even assuming the truth of all the evidence on which Plaintiffs rely, it does not support a claim of gross negligence.

¶33 Finally, Plaintiffs contend that the district court "erred when it granted [Rocky Mountain's] motion for summary judgment on causation based upon mischaracterization of deposition testimony." Plaintiffs' proposed expert testified that "several things could have startled that horse and caused it to start running"; he also testified that if there had not been a gap between the horses, "all of those causes could have been minimalized." He testified that "there should have been extra care taken to get the horses together." The court ruled that summary judgment was appropriate because Plaintiffs "presented no evidence beyond speculation concerning causation."

¶34 Plaintiffs argue that the court ignored the expert's testimony that the danger could have been lessened or eliminated if the gaps had been closed between the horses. We do not agree with Plaintiffs' characterization of the district court's assessment of the causation evidence. But even if the district court erroneously concluded that the evidence could not support a finding of causation, the outcome of this case would be the same, because, as explained above, we agree with ***10** the district court that evidence of gross negligence is lacking here.

¶35 For the foregoing reasons, the district court did not err in granting Rocky Mountain's summary judgment motion on the gross negligence claim. And because we conclude that the undisputed facts support summary judgment for Rocky Mountain even assuming the admissibility of the testimony of Plaintiffs' proposed expert, we need not address Plaintiffs' challenge to the district court's exclusion of that witness.

II. The District Court Did Not Abuse Its Discretion When It Awarded Deposition Costs to Rocky Mountain.

[6] **[7]** ¶36 Plaintiffs contend that the district court "erred when it determined that Rocky Mountain was entitled to the deposition costs in the amount of $2,577.32, together with post-judgment interest, when the same evidence could have been obtained through less expensive means." "In reviewing a district court's denial or award of costs, we apply a highly deferential standard." *Giusti v. Sterling Wentworth Corp.*, 2009 UT 2, ¶ 84, 201 P.3d 966. In *Giusti*, the supreme court concluded that because the trial court "applied the correct standard" and "gave a legitimate reason for its decision," it "did not abuse its discretion." *Id.* ¶ 86.

[8] **[9]** ¶37 Under rule 54(d) of the Utah Rules of Civil Procedure, "[u]nless a statute, these rules, or a court provides otherwise, costs should be allowed to the prevailing party." Utah R. Civ. P. 54(d)(1). "The general rule regarding the recovery of deposition costs is that a party may recover deposition costs as long as the trial court is persuaded that [the depositions] were taken in good faith and, in the light of the circumstances, appeared to be essential for the development and presentation of the case." *Young v. State*, 2000 UT 91, ¶ 6, 16 P.3d 549 (alteration in original) (citation and internal quotation marks omitted). The district court "must find that the depositions were essential because they were used in a meaningful way at trial, or because the development of the case was of such a complex nature that the information in the depositions could not be obtained through less expensive means of discovery." *Id.* ¶ 11.

¶38 Plaintiffs argue that the costs for the depositions of Penunuri, Mother, and one of Penunuri's friends (Friend) "were not necessary and the information in the Motion for Summary Judgment certainly could have been obtained through less expensive means." However, the district court did not decide that the depositions were essential "because the development of the case was of such a complex nature that the information in the depositions could not be obtained through less expensive means of discovery." *See id.* In fact, the court stated, "I haven't really reached a conclusion as to whether or not this case was of such a complex nature that ... less expensive discovery could have been obtained."

¶39 Instead, the court considered whether the depositions were used "in a meaningful way" in resolving the case through summary judgment.[5] The court, in considering Penunuri's deposition, found that "her deposition was used in a very meaningful way in establishing the undisputed facts for the purpose of the motion for summary judgment." The court further stated, "I'm finding and ruling that whether or not it was complex, this was discovery that had to be done with Ms. Penunuri, through a deposition." The court similarly found that

both Mother's and Friend's depositions were "used in a significant way and a meaningful way ... in the motion for summary judgment." The court additionally found that depositions were required to obtain Mother's and Friend's testimony, as "lesser means of discovery were either not available or not accurate and ... through their deposition[s], they were able to clear up issues and facts."

¶40 The district court also found that Penunuri's, Mother's, and Friend's depositions "were taken in good faith" and that they "appeared to be essential" for the development and presentation of the case because they were "used in a meaningful way" in resolving the case. *See id.* ¶¶ 6, 11. Under ***11** our deferential standard, this is enough. We therefore conclude that the district court did not abuse its discretion in awarding Rocky Mountain costs for the depositions of Penunuri, Mother, and Friend.

CONCLUSION

¶41 The judgment of the district court is affirmed.

All Citations

380 P.3d 3, 2016 UT App 154

Footnotes

1 Senior Judge Russell W. Bench sat by special assignment as authorized by law. *See generally* Utah R. Jud. Admin. 11–201(6).

2 When reviewing a district court's rulings on a summary judgment motion, we recite the facts and inferences in the light most favorable to the nonmoving party. *Poteet v. White*, 2006 UT 63, ¶ 7, 147 P.3d 439.

3 We express no opinion on this unbriefed question.

4 Solely for purposes of analyzing the summary judgment motion on gross negligence, we assume that the opinion testimony of Plaintiffs' proposed expert witness was admissible.

5 Plaintiffs do not argue that the district court could not analyze whether the depositions were essential under the "used in a meaningful way" prong.

Addendum C

The Order of Court is stated below:
Dated: September 09, 2014 /s/ CLAUDIA LAYCOCK
01:34:53 PM District Court Judge

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IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

LISA PENUNURI and BARRY SIEGWART, Plaintiffs, vs. SUNDANCE PARTNERS, LTD.; SUNDANCE HOLDING, LLC: SUNDANCE INSTITUTE, INC.; ROBERT REDFORD; REDFORD 1970 TRUST; ROCKY MOUNTAIN OUTFITTERS, L.C.; and DOES I-X Defendants.	**ORDER GRANTING (1) DEFENDANTS' MOTION FOR SUMMARY JUDGMENT REGARDING GROSS NEGLIGENCE AND (2) DEFENDANTS' ALTERNATIVE MOTION FOR SUMMARY JUDGMENT AND MOTION TO EXCLUDE SCOTT EARL AS AN EXPERT WITNESS, FINAL ORDER OF DISMISSAL AND JUDGEMENT** Civil No.: 080400019 Judge Claudia Laycock

The above-entitled matter came before the Court, the Honorable Claudia Laycock presiding, on January 31, 2014 at 9:00 a.m., for a hearing on (1) Defendants' Motion for Summary Judgment Regarding Gross Negligence and (2) Alternative Motion for Summary Judgment and Motion to Exclude Scott Earl as an Expert Witness. Defendants were represented

by attorneys H. Burt Ringwood and A. Joseph Sano. Plaintiffs were represented by attorney Robert D. Strieper.

The Court, having fully considered the legal memoranda submitted, the arguments of counsel, and being fully advised of the issues and law relevant to the pending motions, and for the reasons expressed by the Court orally on January 31, 2014 and February 25, 2014 (which are incorporated by reference), as well as the theories expressed and argued by Defendants, hereby rules as follows:

I. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT REGARDING GROSS NEGLIGENCE

A. GROSS NEGLIGENCE STANDARD

There is no dispute between the parties concerning the standard applicable to establishing a claim of gross negligence under Utah law. "Gross negligence is the failure to observe even slight care; it is carelessness or recklessness to a degree that shows utter indifference to the consequences that may result." *Atkin Wright & Miles v. Mountain States Tel. & Tel. Co.*, 709 P.2d 330, 335 (Utah 1985). "Recklessness is subsumed in [Utah's] definition of gross negligence." *Daniels v. Gamma West Brachytherapy*, 2009 UT 66, ¶ 43, 221 P.3d 256. "Recklessness includes conduct where 'the actor kn[ew], or ha[d] reason to know, . . . of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk.'" *Id.* at ¶ 42 (quoting *Restatement (Second) of Torts § 500 cmt. a* (1965)). *See also Doe v. Doe*, 878 P.2d 1161, 1163 n.1 (explaining that recklessness requires that there be a "strong probability" that harm may result). "[T]o carry a claim of gross negligence, [plaintiffs] are required to show conduct that not

only demonstrates 'an unreasonable risk of physical harm to another' but also that 'such risk is substantially greater than that which is necessary to make his conduct negligent." *Milne v. USA Cycling, Inc.*, 489 F. Supp. 2d 1283, 1287-88 (D. Utah 2007) (quoting *Restatement (Second) of Torts § 500* (1965)).

While ordinarily summary judgment is inappropriate in cases of alleged gross negligence, summary judgment can be properly granted where, based on the undisputed facts, "[i]t cannot be reasonably asserted that [the defendant] 'show[ed] utter indifference'" towards the plaintiff's care. *Blaisdell v. Dentrix Dental Systems, Inc.*, 2012 UT 37, ¶ 17, 284 P.3d 616.

B. UNDISPUTED FACTS AS FOUND BY THE COURT

1. On August 1, 2007, Plaintiff Lisa Penunuri and two friends, Barbara Black and Suzanne Moag, participated in a horseback trail ride at the Sundance Resort located in Provo Canyon.

2. After having dinner at the Sundance Resort, Plaintiff and her friends left for the Sundance stables, arriving between 5:00 p.m. and 5:30 p.m. The horseback trail ride was scheduled for 6:00 p.m.

3. The trail ride at Sundance was operated by Defendant Rocky Mountain Outfitters ("RMO"). Ashley Wright guided the ride for Plaintiff, her two friends, and two others, Kate Fort and her daughter, Haley.

4. Ashley Wright grew up around horses and worked as a trail guide with RMO from the summer of 2004 through the fall of 2008.

5. Ashley, as with all of RMO's guides, was CPR certified and received training at

the beginning of each season on horseback trail guiding. During her deposition, Ashley testified:

> Q. What does the training, the yearly training, entail?
>
> A. Everything.
>
> Q. Meaning?
>
> A. Getting to know the horses, knowing the trails, how to tack/untack, how to do arena lessons. Care and maintenance of the horses. How to take out guided tours, dealing with guests. Safety reasons. Precautions, I guess.

(A. Wright Dep., pp. 12-13, Ex. 2 to Defs.' Mem. in Supp. of MSJ Re: Gross Negligence.)

6. Before embarking on the trail ride, Plaintiff and the other participants received a Horseback Riding Release which, among other things, warned of the risks involved in horseback riding. In pertinent part, the Release states:

> I, the undersigned, . . . understand that horseback riding, sleigh riding or horse drawn wagons (collectively "Horseback riding") involve SIGNIFICANT RISK OF SERIOUS PERSONAL INJURY, PROPERTY DAMAGE OR EVEN DEATH. The risks include NATURAL, MAN-MADE, ENVIRONMENTAL CONDITIONS AND INHERENT RISKS, including changing weather, mud, rocks, variations in steepness, terrain, natural and man-made obstacles, equipment failure and the negligence of others. "Inherent risk" with regard to equine or livestock activities means those dangers or conditions which are an integral part of equine or livestock activities, which may include: (a) the propensity of the animal to behave in ways that may result in injury, harm, or death to persons on or around them; (b) the unpredictability of the animal's reaction to outside stimulation such as sounds, sudden movement, and unfamiliar objects, persons, or other animals; (c) collisions with other animals or objects; or (d) the potential of a participant to act in a negligent manner that may contribute to injury to the participant or others, such as failing to maintain control over the animal or not acting within his or her ability.

(Horseback Riding Release, Ex. 3 to Defs.' Mem. in Supp. of MSJ Re: Gross Negligence.)

7. Plaintiff acknowledged having signed the Horseback Riding Release, but testified

that she only "scanned through it [and] didn't read thoroughly through it." (L. Penunuri Dep., pp. 121-22, Ex. 1 to Defs.' Mem. in Supp. of MSJ Re: Gross Negligence.)

8. In addition to the warnings listed in the Horseback Riding Release, two signs were posted at Sundance, one in the building where guests sign the Horseback Riding Release and the other near the horse arena; both signs provide further warnings to participants of the inherent risks associated with horseback riding.

9. After Plaintiff and her group finished filling out paperwork, they gathered outside near the horses. Plaintiff's friend, Suzanne Moag, recalls RMO's guide, Ashley, giving Lisa and Haley general instructions during that time. Suzanne testified:

> Q. During that time do you recall what instructions or anything that was given before the group set out on the ride?
>
> A. I believe Ashley told Lisa and Haley gave, them some instructions. Barb and I just asked about the temperament of the horses and the names of them.
>
> Q. What kind of instructions do you recall Ashley giving Lisa and Haley?
>
> A. Just about mounting the horse, and I remember when we started out, the horses, Haley's horse and Lisa's horse kept eating.
>
> Q. Grazing?
>
> A. Yes; and it was very difficult for Haley to keep the horse's head up.
>
> Q. Do you recall any instructions given by Ashley discouraging them from letting the horse's graze?
>
> A. Yes. I remember Ashley saying "pull up," "pull up." And Haley was very small and she was not strong enough to keep yanking the horse's head up.
>
> Q. Any instructions about, you know, using the reins, doing this will make the horse go left or right or anything like that?
>
> A. Oh, I'm sure, but I can't recall it. I don't listen to that.

(S. Moag Dep., pp. 19-20, Ex. 6 to Defs.' Mem. in Supp. of MSJ Re: Gross Negligence.)

10. Kate Fort similarly recalls Ashley giving general instructions before embarking on the ride. She testified:

> Q. What's the next thing you remember?
>
> A. Getting in a line. "Once you're on the horse, lean the reins this way to go right, this way to go left, and don't let them eat." You know, you got a little bit of instruction.

(K. Fort Dep., p. 22, Ex. 7 to Defs.' Mem. in Supp. of MSJ Re: Gross Negligence.)

11. Ashley, the RMO guide, led the group and was in front during the entire ride. As the group headed out from the Sundance stables, Haley, Kate and Lisa were the first three riders, with Barbara and Susan in the back. (A. Wright Dep., 38:13-16, Ex. 2 to Defs.' Mem. in Supp. of MSJ Re: Gross Negligence.)

12. About 45 minutes into the ride, the group came to the Stewart Falls Meadow. At that point, the order of the riders changed, with Barbara and Suzanne directly behind Ashley, followed by Kate Fort, her daughter Haley, and Lisa. (*See* A. Wright Dep., 40:2-12, Ex. 2 to Defs.' Mem. in Supp. of MSJ Re: Gross Neglience.)

13. After departing from the Stewart Falls Meadow, Lisa and Haley struggled to keep their horses from grazing, which in turn caused their horses to lag behind slightly. Lisa testified that, at that point, she was "still trying to get the hang of the horse grazing." (*See* L. Penunuri Dep., 138:7-8, Ex. 1 to Defs.' Mem. in Supp. of MSJ Re: Gross Negligence.) Kate Fort testified:

> Q. Were there any problems with any of the riders getting too far behind the others?
>
> A. Once the order changed – up to Stewart Falls, we were pretty much in line.

> Nobody really lagged behind, but once the order changed, there were definitely stretches where some were further behind than others, specifically Haley and Lisa.

(K. Fort Dep., 40:13-19, Ex. 7 to Defs.' Mem. in Supp. of MSJ Re: Gross Negligence.) Ms. Fort further testified:

> Q. So were there any points where, you know, you weren't able to see Haley?
>
> A. There was never a point where I wasn't able to see her.
>
> Q. Okay.
>
> A. There were times where I would definitely encourage her to yank on the reins to get the horse's head up to keep it moving. "Come on, baby. You've got to keep up with the group." But never a point where I couldn't see her.
>
> Q. Was Lisa having problems with her horse grazing, too?
>
> A. Yes.

(K. Fort Dep., 40:23-25; 41:1-10, Ex. 7 to Defs.' Mem. in Supp. of MSJ Re: Gross Negligence.)

14. Ms. Fort testified that during the ride RMO's guide, Ashley, instructed the riders, "Pull up on the reins. Don't let them eat." (K. Fort Dep., 41:20-22, Ex. 7 to Defs.' Mem. in Supp. of MSJ Re: Gross Negligence.)

15. Regarding the distance between her horse, Haley's horse and Plaintiff's horse, Ms. Fort testified:

> . . . We continued on the rest of the trail ride. I'm repeatedly turning around, specifically to check on my daughter, noticing - - you know, she was still having trouble with her horse, as was [Plaintiff], and they were both lagging behind, so Haley would have been a number of horse lengths behind my horse, and Plaintiff a number behind Haley.
>
> Nothing else is really notable to the point where Lisa fell off . . . .

(K. Fort Dep., 42:2-10, Ex. 7 to Defs.' Mem. in Supp. of MSJ Re: Gross Negligence.)

16. In an effort to keep the group together, Ashley testified that she had been "slowing down the whole ride." (A. Wright Dep., 67:8-13, Ex. 1 to Defs.' Reply Mem. in Supp. of MSJ Re: Gross Negligence.)

17. When that did not work because of Haley being unable to keep her horse from grazing, Ashley informed the group that they would be stopping at a clearing in about 100 feet so that she could go back and take the lead rope of Haley's horse and pony it the rest of the way.

18. As Ashley was turning around to pony Haley's horse, Plaintiff fell off the back of her horse.

19. Regarding her fall from the horse, Plaintiff testified:

> Q. . . . Why don't you describe what you remember about the fall.
>
> A. Okay. I remember being on the horse, and we were beginning the climb, and then Haley's horse grazed - - stopped to graze.
>
> Q. Okay.
>
> A. And then her - - I guess - - you know, my horse was stopped behind hers, and my horse started going, and it was - - it was a rougher ride than I remember having had before, other than, you know, with other grazing episodes my horse would, you know, kind of giddyup a little faster than it had been going, because Haley's horse would start up and then mine would start up, too, and then would slow down. And this particular incident, it seemed even rougher than, you know, the giddyup that I had gotten in other stops. And then I don't remember anything until I was on the ground.

(L. Penunuri Dep., pp. 114-115, Ex. 1 to Defs.' Mem. in Supp. of MSJ Re: Gross Negligence.)

20. On January 3, 2008, Plaintiff filed suit against the Defendants for injuries she

sustained as a result of her fall and alleged claims of negligence and gross negligence.[1]

21. On November 30, 2009, Plaintiff designated Scott Earl as an expert witness regarding horse behavior and the dangers associated with riding horses.

22. In his expert report, Mr. Earl expresses several opinions based on his review of the depositions and other discovery materials in this case.

23. During his deposition, Mr. Earl testified that there is no evidence in this case indicating that RMO's guide, Ashley, exercised no care or acted in willful disregard for the care of others. Mr. Earl testified:

> Q. Is there anything that you've seen in the facts of this case, as you understand it, that would indicate that Ashley Wright acted with no care at all?
>
> A. No.

(S. Earl Dep., 71:24-25; 72:1-2, Ex. 10 to Defs.' Mot. for Summ. J. Re: Gross Negligence.) Mr. Earl further testified:

> Q. Is there anything that you see in the record that indicates that Ashley acted intentionally or - -
>
> A. Absolutely not.
>
> Q. - - in willful disregard for the care - -
>
> A. No.
>
> Q. Is there anything in the report that would indicate to you that she acted with no care?
>
> A. No.

(S. Earl Dep., 87:10-17, Ex. 10 to Defs.' Mot. for Summ. J. Re: Gross Negligence.)

1 On March 30, 2010, this Court entered an order dismissing all of Plaintiffs' ordinary negligence-based claims as a matter of law, leaving only Plaintiffs' claim for gross negligence. The Court's ruling was subsequently upheld on appeal.

24. During his deposition, Mr. Earl testified that he does not know what caused Plaintiff's horse to accelerate, but gave several possible reasons. He stated:

> A. There's several factors that could have - - or, in my opinion, several things that could have startled that horse and caused it to start running, going around a blind curve, not seeing the other horses at the time, being a distance, wanting to catch up. I'm not even saying it was startled.
>
> Q. Just may have wanted to catch up?
>
> A. Yes, and they will accelerate to catch up.

(S. Earl Dep., 61:4-15, Ex. 10 to Defs.' MSJ Re: Gross Negligence.)

25. Mr. Earl has testified that there is no way to predict when a horse might accelerate. During his deposition, Mr. Earl stated:

> A. . . . Quick acceleration.
>
> Q. Is there any way to predict that?
>
> A. There's no way to predict any of it. It's an animal. You can minimize the risk by doing certain things.
>
> Q. But there's always that inherent risk with an animal, you don't know what they're going to do?
>
> A. That's right.

(S. Earl Dep., 14:11-22, Ex. 10 to Defs.' MSJ Re: Gross Negligence.) He further testified:

> Q. Is it possible that [Plaintiff] fell off the horse, in your opinion, because - - I mean, is it possible that Lisa could have prevented the horse from trotting?
>
> A. If she knew what she was doing, yes.
>
> Q. She could have, like she did many times on the ride, and not fall off the horse when it accelerated?
>
> A. It's always possible when a horse accelerates, in my experience, and many times when a horse accelerates, it's usually unexpected, and the most experienced

riders can come awfully close to falling off.

Q. That's just one of the inherent risks of riding a horse?

A. That's part of it. When a horse accelerates, you better be ready.

(S. Earl Dep., 74:6-25; 75:1-13, Ex. 10 to Defs.' MSJ Re: Gross Negligence.)

C. CONCLUSIONS OF LAW

Plaintiffs have presented no evidence upon which reasonable minds could conclude that Defendants' guide, Ashley Wright, exercised no care. Nor have Plaintiffs presented any evidence to show that Ashley Wright knew or had reason to know of facts that would have created a high degree of risk of physical harm to Plaintiff Penunuri, but deliberately proceeded to act, or failed to act, in conscious disregard of, or indifference to, that risk. *See Daniels*, 2009 UT 66 at ¶ 42 (*quoting Restatement (Second) of Torts § 500 cmt. a* (1965)).

In this case, Plaintiffs designated Scott Earl as their expert witness. While Mr. Earl has been excluded from offering expert opinion testimony (*see infra*), even Mr. Earl has testified that he was aware of no evidence in this case showing that Ashley Wright exercised no care or acted with willful disregard. The undisputed facts establish that Ashley Wright, among other things, lead Plaintiff Penunuri and the other guests during the trail ride, that she attempted to slow down the ride to keep the riders closer together, and (when that did not work because Haley's horse had stopped to graze) gathered the other riders in a clearing to make room for her to go back and take the lead rope of Haley's uncooperative horse to pony it the rest of the way. Based on the undisputed facts of this case, the Court finds it cannot be reasonable asserted that Defendants "showed utter indifference." *See Blaisdell*, 2012 UT 37, ¶17 (finding that summary judgment on a claim of gross negligence was appropriately granted where the undisputed facts established that

the plaintiff would be unable to show the defendant acted with utter indifference).

The Court rejects Plaintiffs' assertion that "gross negligence" may be established merely by showing that Ashley Wright failed to follow all of the guidelines suggested in Defendant Rocky Mountain Outfitters' employee manual, as internal guidelines or recommendations do not establish a tort law duty or standard of care. *See Jenkins v. Jordan Valley Water Conservancy Dist.*, 2013 UT 59, 744 Utah Adv. Rep. 8 (October 1, 2013).

In addition to the reasons set forth above, the Court finds that summary judgment in favor of the Defendants is appropriate because Plaintiffs have presented no evidence beyond speculation concerning causation. To succeed on their claim, Plaintiffs must establish that Defendants' gross negligence was the proximate cause of Plaintiff Penunuri's injury. Under Utah law, proximate cause is defined as "that cause which, in natural and continuous sequence (unbroken by an efficient intervening cause), produces the injury and without which the result would not have occurred." *Mitchell v. Pearson Enters.*, 697 P.2d 240, 245 (Utah 1985). When the issue of proximate cause is left to speculation, the claim fails as a matter of law. *See Harline v. Barker*, 912 P.2d 443 (Utah 1996).

It is alleged that Plaintiff Penunuri fell and was injured because her horse accelerated unexpectedly. No one knows what caused the horse to accelerate unexpectedly. Plaintiffs' own expert, Scott Earl, testified that there are multiple reasons why Plaintiff Penunuri's horse could have accelerated unexpectedly, including "going around a blind curve, not seeing the other horses at the time, being a distance, [or] wanting to catch up," and he testified that there is no way to predict when a horse might accelerate, it is one of the "inherent risks" of riding a horse. (*See* S. Earl Dep., 61:8-15; 14:15-22, Ex. 1 to Defs.' Mem. in Supp. of Mot. for MSJ Regarding

Gross Negligence.) Plaintiffs have argued that what caused the horse to accelerate is not relevant, and even speculate that there were "probably multiple causes." (*See* Plts.' Opp'n Mem., p. 16.) Plaintiffs seem to take the position that, regardless of what caused the horse to accelerate, Defendants' guide should have prevented the horse from acting unpredictably.

Utah law recognizes that horseback riding involves "inherent risks" that are an integral part of equine activities. *See* Utah Code Ann. § 78B-4-201. These risks include, among other things, "the *unpredictability* of the animal's reaction to outside stimulation such as sounds, sudden movement, and unfamiliar objects, persons, or other animals." *See id.* (emphasis added). Because Plaintiff has not, without engaging in impermissible speculation, presented any evidence establishing that Defendants' conduct was the proximate cause of the horse's unexpected acceleration, as opposed to the various "inherent risks" associated with horseback riding, Plaintiffs' claim fails as matter of law.

II. DEFENDANTS' ALTERNATIVE MOTION FOR SUMMARY JUDGMENT AND MOTION TO EXCLUDE SCOTT EARL AS AN EXPERT WITNESS

A. EXPERT TESTIMONY IN CLAIMS OF GROSS NEGLIGENCE AND RULE 702

Neither party has directed the Court to a standard of care applicable to commercial horseback trail guiding that is fixed by law. Under Utah law, "where a standard of care is not 'fixed by law,' the determination of the appropriate standard is a factual issue to be resolved by the finder of fact." *Wycalis v. Guardian Title of Utah*, 780 P.2d 821, 825 (Utah Ct. App. 1989). "Identification of the proper standard of care is a necessary precondition to assessing the degree to which conduct deviates, if at all, from the standard of care – the core test in any claim of gross negligence." *Berry v. Greater Park City*, 2007 UT 87, ¶ 30, 171 P.3d 442. In this regard, expert

testimony may be helpful in order for the fact finder to determine the defendant's deviation from the industry standard. *See Wycalis*, 780 P.2d at n. 8 ("Where the average person has little understanding of the duties owed by particular trades or professions, expert testimony must ordinarily be presented to establish the standard of care.")

Rule 702 of the Utah Rules of Evidence governs the admissibility of expert testimony. The Rule, which is divided into three sections, provides:

> (a) Subject to the limitations in paragraph (b), a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.
>
> (b) Scientific, technical, or other specialized knowledge may serve as the basis for expert testimony only if there is a threshold showing that the principles or methods that are underlying in the testimony
>
> (b)(1) are reliable,
>
> (b)(2) are based upon sufficient facts or data, and
>
> (b)(3) have been reliably applied to the facts.
>
> (c) The threshold showing required by paragraph (b) is satisfied if the underlying principles or methods, including the sufficiency of facts or data and the manner of their application to the facts of the case, are generally accepted by the relevant expert community.

Utah R. Evid. 702.

To protect against the improper admission of expert testimony, this Court has been given a "gatekeeper" responsibility "to screen out unreliable expert testimony" and to approach "proposed expert testimony with 'rational skepticism'" as it assesses such testimony. *See* Utah R. Evid. 702, 2011 Advisory Committee Note.

B. UNDISPUTED FACTS AS FOUND BY THE COURT

1. In her Complaint, Plaintiff alleges that Defendants were grossly negligent "when [Defendants'] employees acted in reckless disregard to the public safety by failing to keep the herd together, causing the horses to act in a very dangerous yet predictable manner." (Compl., ¶ 36).

2. On November 30, 2009, Plaintiff designated Scott Earl as a liability expert witness with "extensive knowledge of horses and horse behavior." (Plts.' Liability Expert Designation, p. 2, Ex. 1 to Defs.' Mem. in Supp. of Alternative MSJ.)

3. In his expert report, Mr. Earl expresses several opinions based on his review of the depositions and other discovery materials in this case. (*See generally* Scott Earl Report, Ex. 2 to Defs.' Mem. in Supp. of Alternative MSJ.)

4. At the time of his deposition, Mr. Earl owned six horses and testified that he has had horses his entire adult life. (*See* S. Earl Dep., 5:6-13, Ex. 3.)

5. Mr. Earl has never owned a trail guiding business, but testified that as a teenager in the early 1980s, he worked one summer as a ranch hand for Desert Springs Country Club and two summers as a trail guide for Jeremy Ranch. During his deposition, Mr. Earl testified:

> Q. Tell me about your experience as a [trail] guide.
>
> A. What experience do you want to know? I was a ranch hand for Desert Springs Country Club, in Grantsville, in 1982. I was a horse guide for the Jeremy Ranch, 1983 and 1984.
>
> * * *
>
> Q. Explain when and what your duties and responsibilities were.
>
> A. In 1983 and '84, and my responsibilities were taking people on guided horse

rides.

Q. Was that summer employment?

A. Yes.

* * *

Q. Let me ask you, since you left Jeremy Ranch, and that would have been back in '84?

A. Yes.

Q. Have you acted as a guide since that time?

A. No.

(S. Earl Dep., 6:5-9; 10:11-16; 20:12-16, Ex. 3 to Defs.' Mem. in Supp. of Alternative MSJ.)

6. During his deposition, Mr. Earl testified that he was not familiar with the industry standards applicable to the trail guiding business. He testified:

Q. Can you tell me what the industry standard would be with respect to the number of guides that are required?

A. I don't know the industry standard. I think that depends on your group of horses and the group of riders. And I'm not even sure there is an industry standard.

* * *

Q. So let me ask you, in terms of trail guides and running a trail, you've never owned a trail guide business; right?

A. No.

Q. With respect to trail guides, there's really not - - is there a publication or regulations or something that I can go to to figure out what the industry standard would be?

A. I have no idea.

Q. Do you have any idea how we would determine what the industry standard

would be?

A. Well, most of it's common sense. And among horse people, it's not that hard to figure out what works and doesn't work, but I don't know where you would come up with a standard.

* * *

Q. Do you know of an industry standard with respect to the - -

A. I don't know of any industry standard.

Q. - - with respect to the gap [between horses], that becomes a problem?

A. It's all in my experience, but in my years of riding is where I get my opinion from.

(S. Earl Dep., 19:11-17; 20:25; 21:14; 24:3-9, Ex. 3 to Defs.' Mem. in Supp. of Alternative MSJ.)

7. During his deposition, Mr. Earl expressed the opinion that RMO's guide, Ashley Wright, had a responsibility to keep gaps from forming between the horses on the trail ride. He testified:

A. . . . - - it was still her responsibility to keep gaps from forming.

Q. And again, you're not able to point to - - you're not able to tell me where, in the industry standards or guidelines, that would indicate that that would be negligence, are you?

A. No.

Q. That's just based upon your own experience?

A. It's based upon my experience, and my opinion.

Q. And that somebody else could obviously not think that's negligent at all; right?

A. Somebody could. Everybody has a different opinion.

(S. Earl Dep., 48:7-20, Ex. 3 to Defs.' Mem. in Supp. of Alternative MSJ.)

C. CONCLUSIONS OF LAW

Plaintiffs bear the burden of establishing the standard of care applicable to commercial horseback trail guiding. Plaintiffs also bear the burden of establishing that it was Defendants' gross negligence that caused Plaintiff Penunuri's horse to accelerate unexpectedly, resulting in her falling to the ground. Because the standard of care applicable to commercial trail guiding and the issue of what caused Plaintiff's horse to accelerate are both outside the knowledge and experience of the average layperson, the Court finds that Plaintiffs must present expert opinion testimony on these issues. *See Wycalis*, 780 P.2d 821, n. 8.

Plaintiffs designated Scott Earl as their expert to testify concerning the applicable standard of care and causation. According to Plaintiffs' Liability Expert Witness Designation, Mr. Earl "is a Sheriff with Salt Lake County and liaison with the mounted posse and member of the Salt Lake mounted patrol who has extensive knowledge of horses and horse behavior." (*See* Plts.' Liability Witness Designation, Ex. 1 to Defs.' Mem. in Supp. of Alternative MSJ.) The fact that Mr. Earl is generally knowledgeable about horses is not disputed. Mr. Earl, however, has very limited knowledge and experience concerning commercial horseback trail guiding.

Over thirty years ago, as a teenager, Mr. Earl spent one summer working as a ranch hand at Desert Springs Country Club, and then spent two summers working as a trail guide at Jeremy Ranch. Mr. Earl's last experience working as a trail guide was while working at Jeremy Ranch during the summer of 1984. In addition, Mr. Earl repeatedly testified during his deposition that he is not familiar with the industry standards applicable to the trail guiding business. He also

testified that his opinions are based on what he believes to be common sense.

Under Rule 702 of the Utah Rules of Evidence, the Court finds that Mr. Earl is not qualified to render expert opinion testimony concerning the standard of care applicable to commercial horseback trail guiding. Based on his lack of experience in commercial horseback trail guiding, the Court also finds Plaintiffs have failed to make the "threshold showing" that Mr. Earl's opinions have "a basic foundational showing of indicia of reliability," as required under Rule 702. The Court finds that Mr. Earl's opinions consist of his own subjective beliefs, and that his opinions will not assist the trier of fact understand the evidence or determine a fact in issue in this case. The Court finds that Mr. Earl's experience with horses is largely limited to his own personal recreation. He has not owned or managed a commercial horseback trail guiding business and, except for brief summer employment as a teenager thirty years ago, has never guided a commercial trail ride made up of riders with unknown experience and abilities.

Regarding the issue of causation specifically, Mr. Earl gave sworn deposition testimony that there were several factors that could have caused Plaintiff Penunuri's horse to accelerate and cause her to fall, a number of which are recognized "inherent risks" associated with horseback riding. (*See supra.*) In a post-deposition affidavit, Mr. Earl contradicts his prior deposition testimony by stating that, "[i]t is my opinion that it was Ashley Wright's failure to stop and close the gaps at the point when she passed the hikers that caused Ms. Penunuri's horse to accelerate." (S. Earl Decl., ¶ 19, Ex. 3 to Defs.' Mem. in Supp. of Alternative MSJ.) The Court rejects Mr. Earl's contradictory testimony and finds that it only further demonstrates the unreliability and speculative nature of his opinions.

The Court also rejects Plaintiffs' argument that the standard of care may be established

by evidence that Defendants' guide, Ashley Wright, failed to follow RMO's internal guidelines. *See Jenkins*, 2013 UT 59; 744 Adv. Rep. 8 (October 1, 2013) (holding that the alleged breach of internal guidelines cannot be used to establish a tort duty and explaining that expert testimony must be presented if the subject matter is beyond the normal experience or knowledge of the average layperson); *see also, Walker v. Anderson-Oliver Title Ins. Agency*, 309 P.3d 267, 274 (Utah Ct. App. 2013) ("Establishing an industry standard requires more than evidence of a particular company's rules and policies. [. . .] Rather, the standard of conduct which the community demands must be an external and objective one, rather than the individual judgment, good or bad, of the particular actor.") (internal quotations omitted.))

Having found that Mr. Earl's opinions fail to satisfy the requirements of Rule 702, and having found that Plaintiffs cannot satisfy their burden of establishing the standard of care and causation without expert testimony, the Court finds that Plaintiffs' claim for gross negligence must be dismissed as a matter of law.

The Court also rejects Plaintiffs' argument (asserted for the first time at the hearing on January 31, 2014) that they may utilize Defendants' expert witness, Rex Walker, to establish the applicable standard of care. Plaintiffs never asserted in their opposition memoranda that they intended to use Mr. Walker's testimony in their case-in-chief to establish the standard of care. Instead, Plaintiffs relied upon their designated expert, Scott Earl, and attempted to defend his qualifications to opine regarding the standard of care. Thus, the Court rejects Plaintiffs' argument that they may use Defendants' expert to satisfy their burden in establishing the applicable standard of care.

Pursuant to the foregoing, and for good cause appearing, it is hereby ORDERED

ADJUDGED AND DECREED that:

1. Defendants' Motion for Summary Judgment Regarding Gross Negligence is GRANTED;

2. Defendants' Alternative Motion for Summary Judgment and Motion to Exclude Scott Earl as an Expert Witness is GRANTED;

3. Summary Judgment is entered in favor of Defendants and against Plaintiffs, and Plaintiffs' Complaint and all claims contained therein or arising therefrom, alleged or which could have been alleged, are dismissed, with prejudice and on the merits, no cause of action; and

4. Final Judgment, from which an appeal can be taken, is hereby entered in favor of Defendants and against Plaintiffs for costs incurred, pursuant to Utah R. Civ. P. 54(d)(1), in the amount of $2,577.32, together with post-judgment interest as allowed by law.

Approved as to Form:

(Counsel declined to sign)

_____

Robert D. Strieper
Attorney for Plaintiffs

[Executed and entered by the Court as indicated by the date and seal at the top of this Order]

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of August, 2014 a true and correct copy of the foregoing **Order Granting (1) Defendants' Motion for Summary Judgment Regarding Gross Negligence and (2) Defendants' Alternative Motion for Summary Judgment and Motion to Exclude Scott Earl as an Expert Witness, Final Order of Dismissal and**

Judgment was served by the method indicated below, to the following:

Robert D. Strieper STRIEPER LAW FIRM 2366 Logan Way Salt Lake City, UT 84108	( ) ( ) ( ) ( ) (X)	U.S. Mail, Postage Prepaid Hand Delivered Overnight Mail Facsimile E-file email

/s/ Michelle Peters

001781.00009

Addendum C-1

The Order of Court is signed below:
Dated: August 16, 2014 03:49:09 PM
/s/ CLAUDIA LAYCOCK
District Court Judge

H. Burt Ringwood, #5787
A. Joseph Sano, #9925
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Attorneys for Defendants Sundance Partners, Ltd., Sundance Holding, LLC, Sundance Development Corp. Robert Redford, Redford 1970 Trust, and Rocky Mountain Outfitters, L.C.

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

LISA PENUNURI and BARRY SIEGWART,)
)
Plaintiffs,) **ORDER REGARDING**
) **DETERMINATION OF COSTS**
vs.)
)
SUNDANCE PARTNERS, LTD.;)
SUNDANCE HOLDING, LLC:)
SUNDANCE INSTITUTE, INC.;)
ROBERT REDFORD;)
REDFORD 1970 TRUST;) Civil No.: 080400019
ROCKY MOUNTAIN OUTFITTERS, L.C.;)
and DOES I-X) Judge Claudia Laycock
)
Defendants.)

The above-entitled matter came before the Court, the Honorable Claudia Laycock presiding, on June 19, 2014 at 1:30 p.m., for a hearing regarding Determination of Costs. Defendants were represented by attorney A.J. Sano. Plaintiffs were represented by attorney Robert D. Strieper.

The Court, having fully considered the legal memoranda submitted, the arguments of counsel, and being fully advised of the issues and relevant law, and for the reasons expressed by the Court orally at the hearing on June 19, 2014 (which is incorporated by reference), hereby rules as follows:

Regarding the recovery of depositions costs, as a general rule, a party may recover deposition costs as long as the "trial court is persuaded that [the depositions] were taken in good faith and, in the light of the circumstances, appeared to be essential for the development and presentation of the case." *Young v. State*, 2000 UT 91, ¶6, 16 P.3d 549. *See also Frampton v. Wilson*, 605 P.2d 771, 774 (Utah 1980) ("a majority of this Court has approved the taxing as costs the taking of depositions, but subject to the limitation that the trial court is persuaded that they were taken in good faith and, in the light of the circumstances, appeared to be essential for the development and presentation of the case.") "[D]eposition costs can be recoverable if the trial court determines that the deposition was essential to the case, either because the deposition was used in some meaningful way at trial or because the development of the case was of such a complex nature that the information provided by the deposition could not have been obtained through less expensive means of discovery.")

In this case, Defendants seek the deposition costs of Plaintiff Lisa Penunuri ($840.09), Kate Fort ($493.07), Suzanne Moag ($754.56), and Scott Earl ($452.60), as well as the statutory witness fee for Kate Fort ($18.50) and Scott Earl ($18.50).[1]

As a preliminary matter, the Court finds no evidence that any of the above depositions were not taken in good faith. The Court further finds that each of the depositions were used in a meaningful way in Defendants' motions for summary judgment and were necessary to development of this complex case. With respect to Plaintiff Lisa Penunuri, her deposition was used to establish the facts

[1]

surrounding the accident and her knowing and voluntary asset to the pre-injury release she signed prior to embarking on the horseback trail ride. Regarding Kate Fort and Susan Moag, the Court finds that their depositions were used meaningfully by Defendants to establish that there was no evidence Defendants' guide exercised no care or acted with utter indifference toward the safety of those on the trail ride. Concerning Scott Earl, the Court finds that his deposition was used meaningfully and extensively by Defendants in establishing that he was aware of no evidence that would support Plaintiffs' gross negligence claim and that he lacked the expertise necessary to render opinion testimony concerning the standard of care applicable to the commercial horseback trail guiding industry.

THEREFORE, it is hereby ORDERED ADJUGED AND DECREED that Defendants be awarded deposition costs and witness fees in the total amount of $2,577.32, together with post-judgment interest as allowed by law.

This order concludes the final issue in this matter. This is a final order, and this case is now ready for appeal.

Approved as to Form:

Declined to sign

_____

Robert D. Strieper
Attorney for Plaintiffs

[Executed and entered by the Court as indicated by the date and seal at the top of this Order]

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of July, 2014, a true and correct copy of the foregoing **Order Regarding Determination of Costs** was served by the method indicated below, to the following:

Robert D. Strieper ( ) U.S. Mail, Postage Prepaid
Strieper Law Firm ( ) Hand Delivered
2366 Logan Way ( ) Overnight Mail
Salt Lake City, UT 84108 ( ) Facsimile
(X) E-file email

/s/ Michelle Peters

001781.00009

Defendants' Memorandum of Costs included additional costs and witness fees. However, prior to the hearing, Defendants stipulated to the withdrawal of all but the costs and witness fee listed above.